No. 75-6521

In the Supreme Court of the United States

OCTOBER TERM, 1976

DONALD ABNEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,

SHIRLEY BACCUS-LOBEL,
MARC PHILIP RICHMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

Cases—continued:

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OPINIONS BELOW

The court of appeals rendered no opinion. An earlier opinion of the court of appeals is reported at 515 F. 2d 112. The oral opinion of the district court (A. 44–49) is unreported.

JURISDICTION

The judgment of the court of appeals (A. 50–51) was entered on February 10, 1976. A petition for rehearing was denied on March 5, 1976 (A. 52). The petition for a writ of certiorari was filed on April 5, 1976, and was granted on June 14, 1976 (A. 53). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. a. Whether a pretrial order denying a motion to

dismiss an indictment on double jeopardy grounds may be appealed by the accused prior to trial.

b. If so, whether a court of appeals has jurisdiction to consider other claims presented pendent to that appeal.

2. Whether the Double Jeopardy Clause bars a retrial following reversal of petitioners' convictions at their behest because they had been tried on a duplicitous indictment.

3. Whether the pending indictment charges an offense.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

28 U.S.C. 1291 provides in relevant part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

18 U.S.C. 1951 is set out at Pet. Br. 3–4.

STATEMENT

1. On March 14, 1974, a one-count indictment returned in the United States District Court for the Eastern District of Pennsylvania charged petitioners, along with Clarence Starks and Merrill Ferguson, with conspiracy and attempt to obstruct interstate commerce by extortion, in volation of 18 U.S.C. 1951.

The prosecution's case at trial, which is fairly summarized in the opinion of the court of appeals on the

first appeal in this case, was based upon the testimony of Ulysses J. Rice, the victim of the conspiracy. Rice owned "Nookie's Tavern," a bar in Philadelphia that sold liquor distilled and bottled outside the State (2B Tr. 3, 51–52, 56, 61, 64).[1] Rice testified that on several occasions in December 1973 petitioner Robinson, a Black Muslim, had visited his tavern and offered to sell him the Muslim newspaper and food items. He testified that on December 8 Robinson and Ferguson entered the tavern and demanded that Rice give them $200 in honor of "Founder's Day," a Muslim holiday. Robinson and Ferguson collected the $200 from Rice three days later when they returned to the tavern accompanied by petitioner Abney (2B Tr. 5–14).

Petitioners Robinson and Abney returned to the tavern the following week and demanded that Rice pay them $200 weekly. They told Rice that if he was able to pay "taxes to the white man and to the Government," he could pay "taxes" to them (2B Tr. 19–20). Rice protested, but was told to pay if he "knew what was good for [him]" (2B Tr. 21). As Robinson and Abney were leaving, Abney told Rice: "Don't give us no trouble because you know what will happen to you" (2B Tr. 22).

The next evening petitioner Starks approached Rice at a movie theater; he told him that "they had had a meeting" about him, that Rice was to have been required to pay $1500, but that Starks had managed to reduce the payment to $500. After this incident Rice

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[1] Transcript references are designated by day of trial, section, and page number. Thus "2B Tr. 3" refers to page 3 of section B of the transcript of the second day of trial.

concluded that his life was in jeopardy; he therefore did not return to the tavern for approximately two months. He had no contact with petitioners during this period, although they regularly sought him at the tavern (2B Tr. 25–28, 51; 5B Tr. 616–619).

By February 19, 1974, Rice had returned to the tavern. On that day petitioner Starks visited him and demanded $500. Starks told Rice that he could no longer hide, that the money had to be paid three days later, and that he didn't care "who died or what" (2B Tr. 52–54). Starks also told Rice that when he returned for the money Robinson would be there "to straighten this out" (2B Tr. 54). Fearing once again that his life was endangered, Rice contacted the Federal Bureau of Investigation (2B Tr. 55).

Petitioner Starks returned to the tavern on February 21. Clarence Starks and petitioner Robinson accompanied him but remained outside (2B Tr. 55–56; 5B Tr. 617–618). Petitioner Starks demanded $500 and threatened to have petitioner Robinson enforce the demand. Rice resisted payment, but Starks told him he had "better watch [his] life" (2B Tr. 61). After additional threats were made, Rice gave petitioner Starks an envelope containing money that had been marked by federal agents. Petitioner Starks and Clarence Starks were promptly arrested (2B Tr. 59–64). Rice had a tape recorder on his body, and the transaction was recorded. The recording was received in evidence at trial (3 Tr. 111).[2]

[2] Petitioners' defense was that the payments by Rice were *bona fide* contributions to a religious cause, not the product of extortion.

2. Petitioners were found guilty; Clarence Starks and Ferguson were acquitted by the jury. The court of appeals reversed petitioners' convictions and remanded for a new trial because the tape recording had been admitted into evidence without proper authentication (515 F.2d at 118–124). The court rejected many of petitioners' other arguments (*id.* at 124–125). It agreed with petitioners, however, that the indictment was duplicitous (*id.* at 115–118).[3] Because, in the court of appeals' view, a new trial was required by the erroneous admission of the tape recording, it did not pass upon the government's argument that the instructions to the jury prevented petitioners from being prejudiced by the duplicity of the indictment (*id.* at 118). In order to avoid similar problems at the next trial, the court of appeals instructed the government to elect between the conspiracy and attempt charges (*id.* at 118, 125).

3. At a pretrial conference on remand, the prosecutor stated that the government would proceed on the conspiracy charge. Petitioners then moved to dismiss the indictment, contending (1) that retrial would violate the Double Jeopardy Clause and (2) that the indictment, as modified by the election, does not charge an offense (A. 38–43). The motions were denied by the district court (A. 44–49), and petitioners immediately filed a notice of appeal.

The government, observing that *United States* v.

[3] The indictment and pertinent portions of the trial court's instructions are set forth at pages 56–58, *infra*, in which we address petitioners' claim that because of this duplicity their retrial is barred by the Double Jeopardy Clause.

DiSilvio, 520 F.2d 247, 248 n. 2a (C.A. 3), certiorari denied, 423 U.S. 1015, had held that the denial of a pretrial motion to dismiss an indictment on double jeopardy grounds was immediately appealable, asked the court of appeals to overrule *DiSilvio* and to dismiss the appeal. The court of appeals did not respond to this request. After ordering the case to be submitted on the briefs without oral argument, the court affirmed without opinion, rejecting both of petitioners' contentions (A. 50–51).

SUMMARY OF ARGUMENT

I

The first question the Court must consider is whether the court of appeals had jurisdiction over petitioners' pretrial appeal from the denial of their motions to dismiss the indictment. We submit that it did not have jurisdiction.

1. "The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment." *DiBella* v. *United States*, 369 U.S. 121, 124. The First Judiciary Act did not provide for any appellate review in criminal cases. Until 1879, when the circuit courts were given jurisdiction by writ of error to review judgments of conviction in some criminal cases, the only method of review was by certificate, and that could be used only when the trial judges were evenly divided on a legal question and were unable to render a decision.

The first right to appeal was created in 1889, and that statute allowed review of convictions in capital

cases. When Congress revised the structure of the federal courts in 1891 it created a right to appeal from convictions of crimes punishable by imprisonment. Not until 1911 was there a general right of appellate review of all judgments of conviction.

Congress has given great attention to defining the circumstances under which an appeal is permissible. When Congress has perceived the need for greater review, it has provided that review. Interlocutory review has been particularly disfavored, however; the only provision for interlocutory review was the certificate of division, and that was necessary to enable the court to decide the case before it. Each time Congress has devised a statute pertaining to criminal appeals by defendants, it has either limited jurisdiction to review of convictions or used language commonly accepted as embodying a requirement of finality. Any exception to the finality principle has been explicitly articulated.

The intent of Congress to forbid interlocutory appeals by defendants is expressed most clearly in its reaction to a peculiar practice in the District of Columbia that threatened to delay the Teapot Dome trials because of a pretrial appeal. Congress passed a statute forbidding such pretrial appeals because, as the House Report (H.R. Rep. No. 1363, 69th Cong., 1st Sess. 2 (1926)) stated:

> [T]he allowance of [interlocutory] appeals has been given in civil cases but has not been recognized or provided for in criminal cases.
>
> * * * Delay in criminal cases is already a grave subject of general criticism and to allow appeals in interlocutory matters would serve to bring the administration of criminal law into greater discredit.

Only in recent years has Congress provided for any interlocutory review, and it has done so only in limited and specifically identified circumstances in which no review whatever could be had following final judgment. 18 U.S.C. 3731. There is no reason to believe that 28 U.S.C. 1291, which derives from an 1891 act, serves as a catch-all authorizing interlocutory appeals not otherwise provided for.

2. This Court has consistently rejected arguments by defendants in criminal cases that interlocutory appeal should be allowed in order to spare them the burdens of a trial that, they say, should not be held at all. In *Heike* v. *United States*, 217 U.S. 423, a witness had been compelled to testify in exchange for transactional immunity. He was later indicted, and he claimed that his immunity, which included the right not to be tried, extended to that crime. After the trial court rejected his arguments, Heike sought to appeal; this Court held that such a pretrial appeal was not authorized by statute. The Court acknowledged that its holding might compel Heike to stand trial unnecessarily and that the trial itself might be forbidden, yet it analogized Heike's predicament to that of one whose plea of former jeopardy is rejected and concluded that an appeal would not be allowed in either case until after a conviction. *Heike* has been reaffirmed and applied to other constitutional claims.

"[T]he whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act" (*Carroll* v. *United States*, 354 U.S. 394, 399) thus demonstrates that in criminal cases there is no appellate jurisdiction, absent an explicit statute, until the

entire case has come to a close and all questions concerning the propriety of a conviction can be reviewed at the same time. The wisdom of this course is obvious. In a federal criminal prosecution every question is a federal question. The resolution of any one of them may prove to be academic in light of later developments in the case. Although a trial court decides that the Double Jeopardy Clause does not bar the pending trial, it later may decide that critical evidence should be suppressed or that the Speedy Trial Clause forbids further proceedings. If the case goes to trial, the jury may acquit. If each potentially controlling constitutional question could be presented for resolution by the court of appeals before trial, litigation would be interminable, and the vital societal interest in speedy trial of criminal charges would be crippled; at the same time, the appellate courts would devote substantial resources to the resolution of questions that may become moot. During the time necessary to brief, argue and decide the appeal, evidence may be lost and memories may fade, thereby impairing the accuracy of verdicts when the trial finally is held.

3. Several courts of appeals have concluded, however, that double jeopardy claims are collateral to the issues of the case and therefore appealable under the "collateral order doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545–547. *Cohen* was a civil case, and its principles are not easily transferrable to criminal cases, with their different history and needs. But however that may be, a double jeopardy claim is not collateral. The ultimate issue at stake in a criminal case is the propriety of the trial and conviction. A plea

of former jeopardy is simply one among many possible reasons why there should be no conviction. If the defendant is convicted, the double jeopardy claim can be raised on appeal; if the district court resolved it incorrectly, the conviction will be reversed. The claim is not forever lost if not resolved by appeal prior to trial.

It is true that the Double Jeopardy Clause, unlike some other constitutional provisions, may supply a reason why there should be no trial as well as a reason why there should be no conviction. Some courts have accordingly concluded that an interlocutory appeal is necessary to ensure "full enjoyment" of the right not to be tried. But the Double Jeopardy Clause is not different in this regard from the statute at issue in *Heike* or the constitutional claims raised in other cases. This Court consistently has held that "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, 309 U.S. 323, 325.

The argument that an interlocutory appeal is necessary whenever the defendant asserts a "right not to be tried" rests upon the unarticulated premise that an appeal is part of the right itself. As this Court has held, however, jurisdiction of appellate courts is defined by federal statutes and not by the nature of the right sought to be enforced. The question thus is not whether there is an abstract right not to be tried, but whether Congress has provided for pretrial appeals to contest a district court's decision to require the accused to stand trial. To assert that full enjoyment of the rights secured by the Double Jeopardy Clause requires an interlocutory appeal is to beg the very question presented by this case.

Perhaps occasional delay might seem to be an acceptable price to pay for ensuring the vindication of just claims. Common sense indicates, however, that because the district courts correctly resolve the vast majority of double jeopardy claims presented to them, the price for correcting a few errors before trial would be delay in many cases while defendants who find delay advantageous appeal from correct decisions. Congress might conclude that this price is not too dear, but it has not yet done so; until it does, defendants must await conviction before obtaining appellate review of their double jeopardy claims.

4. Finally, even if a court of appeals has jurisdiction over a pretrial appeal raising a double jeopardy claim, this jurisdiction should not be expanded to permit resolution of any other kind of claim—such as, in this case, petitioners' assertion that the indictment does not state an offense—even though appended to a double jeopardy claim. The only rationale for interlocutory review of double jeopardy claims is that they are severable from, and in urgent need of review before, the other issues in the case, and that they are unreviewable in any meaningful sense after final judgment. It would make a mockery of this rationale if the double jeopardy claim were then used as a bootstrap to review the other issues in the case, as the court of appeals did here.

II

Petitioners' double jeopardy argument is insubstantial. Although they were convicted under a duplicitous indictment, their convictions were reversed on appeal at their behest. Since *United States* v. *Ball*, 163 U.S.

662, it has been settled that the Double Jeopardy Clause "imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside." *North Carolina* v. *Pearce*, 395 U.S. 711, 720 (footnote omitted and emphasis deleted). Moreover, the instructions to the jury at the first trial precluded any possibility that petitioners had been implicitly acquitted of the crime with which they are now charged.

III

The indictment charges petitioners with an offense. It alleges a conspiracy to commit extortion. Petioners' reading of the indictment as charging that the object of the conspiracy was attempted extortion—that is, as charging that the conspirators intended to fail to extort money—is implausible. The attempted extortion was simply an overt act of the conspirators; an agreement to commit an unlawful act is a completed conspiracy whether or not it attains its end. Petitioners' further contention, that the indictment is defective because it does not allege that they agreed, misunderstands the nature of the crime of conspiracy; because a conspiracy is an agreement, an indictment need not allege both conspiracy and agreement.

ARGUMENT

Petitioners were tried and convicted. After their convictions were reversed at their behest, they asked the district court to dismiss the indictments. They argued that the Double Jeopardy Clause forbids a second trial and that the indictment does not charge an offense. The district court declined, concluding that petitioners' arguments had been foreclosed in large measure by the

court of appeals' order remanding the case for a new trial.

Before their second trial could begin, petitioners again appealed. The court of appeals affirmed without opinion, and petitioners have brought the case here. Unless the court of appeals had jurisdiction over petitioners' pretrial appeal, however, this case cannot be considered on its merits. This Court's first task, therefore, is to determine whether the court of appeals was empowered to entertain the interlocutory appeal. *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737; *DiBella* v. *United States*, 369 U.S. 121.

I

A COURT OF APPEALS DOES NOT HAVE JURISDICTION TO HEAR ANY INTERLOCUTORY APPEALS BY DEFENDANTS IN CRIMINAL CASES

A. INTRODUCTION

1. The courts of appeals are divided on the question whether the denial of a motion to dismiss an indictment on double jeopardy grounds is immediately appealable. The majority have held that it is. *United States* v. *Lansdown*, 460 F.2d 164, 170–172 (C.A. 4);[4] *United States* v. *Beckerman*, 516 F.2d 905, 906–907 (C.A. 2); *United States* v. *DiSilvio*, 520 F.2d 247, 248 n. 2a (C.A. 3), certiorari denied, 423 U.S. 1015; *United States* v. *Barket*, 530 F.2d 181 (C.A. 8), certiorari denied November 1, 1976 (No. 75–1280). Cf. *Thomas* v. *Beasley*, 491 F.2d 507 (C.A. 6) (grant of pretrial writ of *habeas corpus* on double jeopardy grounds); *United States ex*

[4] See also *United States* v. *Hankish*, C.A. 4, No. 76–1334, decided July 1, 1976, certiorari dismissed November 11, 1976, No. 76–135, which extends the *Lansdown* principle to all double jeopardy claims, even frivolous ones.

rel. Webb v. *Court of Common Pleas*, 516 F.2d 1034 (C.A. 3) (same). Several courts have extended this holding in various ways. The Second Circuit has allowed a pretrial appeal to argue breach of a plea bargain allegedly involving a promise of non-prosecution. *United States* v. *Alessi*, 536 F.2d 978 (*Alessi I*). The Fourth Circuit has allowed a pretrial appeal from an order rejecting a speedy trial claim. *United States* v. *MacDonald*, 531 F.2d 196, petition for a writ of certiorari pending, No. 75–1892. The Third Circuit in the instant case considered a statutory claim that was appealed at the same time as a double jeopardy claim.

The Fifth and Ninth Circuits, however, have held that interlocutory appeals of double jeopardy issues are not permissible. *United States* v. *Bailey*, 512 F.2d 833, 836–838 (C.A. 5), certiorari dismissed, 423 U.S. 1039; *United States* v. *Young*, C.A. 9, No. 75–3102, decided October 19, 1976. The Seventh Circuit has dismissed an interlocutory appeal of this sort without opinion. *United States* v. *Bartemio*, No. 76–1039, decided April 5, 1976, petition for a writ of certiorari pending, No. 75–6657. And Judge Friendly now has written a thorough opinion for himself and Judge Van Graafeiland explaining why they consider *Bailey* to be right and *Beckerman* wrong. *United States* v. *Alessi*, C.A. 2, No. 76–1189, decided July 7, 1976 (*Alessi II*), petition for a writ of certiorari pending, No. 76–176.[5]

[5] Because *Alessi II* and *Young* are not yet published, we have reprinted them for the convenience of the Court as an appendix to this brief. The *Alessi II* panel eventually assumed jurisdiction and affirmed on the merits; because certiorari had been granted in the instant case, the panel decided not to seek *en banc* reconsideration of Second Circuit precedent.

2. In *Cobbledick* v. *United States*, 309 U.S. 323, this Court explained why interlocutory appeals may not be taken in criminal cases in the absence of explicit statutory authorization. It is difficult to improve upon the analysis of the unanimous Court, speaking through Mr. Justice Frankfurter, and so we set it out at some length (309 U.S. at 324–326):

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act [2] and has been departed from only when observance of it would practically defeat the right to any review at all.[3] Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1889 was there review as of right in criminal cases.[4] An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. *Cogen* v. *United States*, 278 U.S. 221.

In thus denying to the appellate courts the power to review rulings at *nisi prius*, generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality—the idea underlying "final judgments and decrees" in the Judiciary Act of 1789 and now expressed by "final decisions" in § 128 of the Judicial Code—is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system.

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[2] §§ 21, 22, 25 of the Act of September 24, 1789, 1 Stat. 73, 83–85. For a discussion of the historical background, English and American, of the finality concept, see Crick, The Final Judgment as a Basis for Appeal, 41 Yale L. J. 539.

[3] See § 129 of the Judicial Code, 28 U.S.C. § 227, dealing with appeals from interlocutory injunctions, appeals from interlocutory decisions in receivership cases and from interlocutory decrees determining rights and liabilities in admiralty litigation.

[4] See *United States* v. *More*, 3 Cranch 159. Only by certificate of division of opinion in the circuit courts could review be obtained. See Curtis, Jurisdiction of the United States Courts, 82. By the Act of 1889 review as of right was allowed in capital cases. 25 Stat. 655, 656. For the history of federal criminal appeal see *United States* v. *Sanges*, 144 U.S. 310, 319–22.

The policies adduced by the Court in *Cobbledick* apply with like force to double jeopardy claims as to the many other constitutional claims that arise in a federal criminal case. All should await resolution in the ordinary course. Any other rule would lead to "leaden-footed" administration of justice, in which frivolous arguments could bring the process to a halt while evidence dissipates and the memories of witnesses fade. Moreover, the prohibition of interlocutory appeals will rarely work injustice. After all, the vast majority of

meritorious double jeopardy claims will be recognized by the district courts.[6] In some cases errors doubtless

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[6] While we have no means of preparing a complete catalogue of cases in which interlocutory double jeopardy appeals have been entertained by the courts of appeals, we are aware of 10 such cases since *Lansdown*. In every one of these cases the court of appeals affirmed the district court's rejection of the double jeopardy claim. In each of the cases, moreover, the interlocutory appeal produced substantial delay. The delays in *Hankish* and the instant case are discussed in the text (see pp. 45–46, *infra*). *United States* v. *Barket*, *supra*, is another example. A two-count indictment was filed in May 1974. Barket was tried and acquitted on one of those counts early in 1975. He then moved to dismiss the other count, arguing that prosecution on it is barred by the Double Jeopardy Clause. The district court denied the motion and Barket appealed. The court of appeals dismissed portions of the appeal and affirmed on the remaining issues on December 9, 1975. Rehearing was denied in February 1976, and Barket filed a petition for a writ of certiorari (No. 75–1280), which was denied on November 1, 1976. The delay so far exceeds 18 months, and the trial still has not been held. Even when a court of appeals dismisses an interlocutory appeal for want of jurisdiction, the delay can be substantial. In *United States* v. *Young*, *supra*, the district court rejected the double jeopardy claim on August 8, 1975. Young appealed, and the case was not argued until the summer of 1976. The appeal was dismissed on October 19, 1976. Young still can file a petition for a writ of certiorari.

United States v. *MacDonald*, *supra*, is the only recent federal case in which a defendant has prevailed on an interlocutory appeal. That case involved the Speedy Trial Clause rather than the Double Jeopardy Clause. It is far from clear, however, that the district court's rejection of MacDonald's claim was in error. The court of appeals was divided, and we have filed a petition for a writ of certiorari (No. 75–1892). We have argued that the district court was right and the court of appeals was wrong; if this Court should agree with our arguments, MacDonald's case would return to the district court for trial after a substantial delay. (Trial had been set for August 1975, but the court of appeals stayed the trial pending resolution of the appeal.)

will occur, and in consequence a trial will be held that should not have taken place. But exposure to that risk "is one of the painful obligations of citizenship." The cost of correcting error before trial in a few cases is delay in many cases. Here, as with other constitutional claims, "[t]he correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." 309 U.S. at 325–326.

This Court has not retreated from the views it expressed in *Cobbledick*. It stated, again unanimously, in *DiBella* v. *United States*, *supra*, 369 U.S. at 124, that "[t]he general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment." On account of this principle, it held, neither the defendant nor the prosecution could appeal before trial from an adverse ruling on a constitutional search and seizure question, absent explicit statutory authority. The Court explained that "[t]his insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases" (*ibid.*).

Because so many courts of appeals have entertained pretrial appeals from the rejection of double jeopardy claims, however, we believe it necessary to explore the issue in greater depth. We begin with a discussion of the genesis of 28 U.S.C. 1291, the statute controlling

the right of defendants to appeal in criminal cases.[7] This jurisdictional statute must "be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes.' " *Palmore* v. *United States*, 411 U.S. 389, 396, quoting from *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 212. Because Section 1291 is "so much a product of the whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act," it must be approached "in the light of that history and of the axiom that clear statutory mandate must exist to found jurisdiction." *Carroll* v. *United States*, 354 U.S. 394, 399.

B. CONGRESS HAS GRANTED TO THE COURTS OF APPEALS IN CRIMINAL CASES THE POWER TO REVIEW, AT A DEFENDANT'S BEHEST, ONLY FINAL JUDGMENTS OF CONVICTION

1. The First Judiciary Act, 1 Stat. 73, did not provide any appellate review in federal criminal cases. Although the Act conferred appellate jurisdiction in certain civil cases,[8] the question of providing appellate re-

[7] Section 1291, the sole applicable statute, sets up the only avenue of appellate review for criminal defendants. A right of appeal, even as to constitutional questions, is not an element of due process of law. *McKane* v. *Durston*, 153 U.S. 684, 687. See also *United States* v. *MacCollom*, No. 74–1487, decided June 10, 1976, plurality slip op. 5; *Estelle* v. *Dorrough*, 420 U.S. 534, 536–537; *Ortwein* v. *Schwab*, 410 U.S. 656, 660; *Lindsey* v. *Normet*, 405 U.S. 56, 77; *Griffin* v. *Illinois*, 351 U.S. 12, 18; *District of Columbia* v. *Clawans*, 300 U.S. 617, 627; *Ohio* v. *Akron Park District*, 281 U.S. 74, 80; *United States* v. *Heinze*, 218 U.S. 532, 545–546; *Reetz* v. *Michigan*, 188 U.S. 505, 508; *Murphy* v. *Massachusetts*, 177 U.S. 155, 158.

[8] See Sections 10, 21 and 22 of the Act, 1 Stat. 77–78, 83–84.

view in criminal cases does not appear to have been discussed or considered, "either because the book learning about common law limitations upon the availability of the writ [of error] in criminal cases was generally accepted doctrine, or because of the sentiment against enhancement of the scope of the Supreme Court's appellate jurisdiction." Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* 610 (1971). This Court early held that the Act had not conferred a right of appellate review in federal criminal cases.[9] *United States* v. *More*, 3 Cranch 159, 172; *Ex parte Kearney*, 7 Wheat. 37, 42.

The first statutory provision for appellate review in federal criminal cases was Section 6 of the Act of April 29, 1802, 2 Stat. 159, which allowed the two judges sitting on the circuit courts to certify a controlling question to the Supreme Court in the event of disagreement. This rarely led to consideration of the case by two courts; the "possibility of Supreme Court review on certificate of division of opinion in the circuit court was remote because of the practice of single district judge's holding circuit court." *Stone* v. *Powell*, No. 74–1055, decided July 6, 1976, slip op. 8 n. 7.[10]

In 1879 the circuit courts were given jurisdiction to review by writ of error final judgments in criminal

[9] The writ of error in criminal cases in England was not available to review felony or treason proceedings until relatively recent times, although discretionary review by extraordinary writ could sometimes be obtained. Congress may have contemplated a similar system of review in federal criminal cases. Orfield, *History of Criminal Appeal in England*, 1 Mo. L. Rev. 326, 332–333 (1936).

[10] See also *United States* v. *Daniel*, 6 Wheat. 542, 547–548.

cases tried before the district courts, if the sentence imposed included either imprisonment or a fine exceeding $300.[11] Such review was available, however, only at the discretion of a circuit judge. Act of March 3, 1879, 20 Stat. 354. Hence, "[f]or nearly a century trials under the Federal practice for even the gravest offences ended in the trial court, except in cases where two judges were present and certified a question of law" to the Supreme Court or where the circuit court allowed a writ of error. *Reetz* v. *Michigan*, 188 U.S. 505, 508.

In 1889 Congress first accorded some criminal defendants a right to appellate review. Section 6 of the Act of February 6, 1889, 25 Stat. 656, provided that a defendant had the right to a writ of error in the Supreme Court to review the "final judgment" of any federal court "in all cases of *conviction* of crime the punishment of which provided by law is death" (emphasis added).

Two years later Congress revised the structure of federal trial and appellate courts. Section 6 of the Circuit Court of Appeals Act, 26 Stat. 828, established circuit courts of appeals with "jurisdiction to review by appeal or by writ of error final decisions in the district court and the existing circuit courts in all cases other than those [reviewable by the Supreme Court]," including "cases arising * * * under the criminal laws * * *." The Act gave the Supreme Court jurisdiction to

[11] By this time the district courts had jurisdiction of all federal crimes and offenses not capital. Rev. Stat. § 563 (1873–1874). The circuit courts had exclusive jurisdiction over capital crimes and jurisdiction concurrent with the district courts over noncapital crimes. Rev. Stat. § 629, ¶ 20.

hear "appeals or writs of error" from the district or circuit courts "[i]n cases of *conviction* of a capital or otherwise infamous crime" (Section 5, 26 Stat. 827; emphasis added).[12] Because the term "infamous crimes" as used in the statute included all crimes punishable by imprisonment (*In re Claasen*, 140 U.S. 200, 204–205), the new circuit courts of appeals did not have appellate jurisdiction over significant cases until six years later. The Act of January 20, 1897, 29 Stat. 492, amended the Circuit Court of Appeals Act to provide that "appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit court of appeals in cases of *conviction* of an infamous crime not capital" (emphasis added).

With the later enactment of the Judicial Code, Congress granted to the circuit courts of appeals jurisdiction to review "by appeal or writ of error final decisions in the district courts * * * in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court." Act of March 3, 1911, Section 128, 36 Stat. 1133.[13] Because Congress also ended this Court's jurisdiction over writs of error in capital cases (Section 238, 36 Stat. 1157), the Judicial Code effectively transferred to the circuit courts of appeals the jurisdiction to review almost all convictions

[12] This enactment also gave defendants a right of appeal from a final judgment to the Supreme Court where the jurisdiction of the lower court was in issue or where a constitutional claim was involved (see *Motes* v. *United States*, 178 U.S. 458, 466–467) and repealed the method of reviewing questions arising in the lower courts by certificate of division (*United States* v. *Hewecker*, 164 U.S. 46).

[13] This Act also abolished the circuit courts. Section 289, 36 Stat. 1167.

in criminal cases. See *Carroll* v. *United States*, *supra*, 354 U.S. at 400–401 n. 9.

In 1925 Congress repealed the provisions of the Circuit Court of Appeals Act that had allowed direct appeal to the Supreme Court in all cases in which the jurisdiction of the lower court was attacked or constitutional claims were raised. Act of February 13, 1925, Section 238, 43 Stat. 938. This established a system of review at the behest of defendants in criminal cases identical in substance to the powers of today's courts of appeals. Only two changes have been made since then. First, Congress abolished the "writ of error" and provided that all cases would be reviewed by appeal.[14] Act of January 31, 1928, 45 Stat. 54. This statute was not intended to change the scope of appellate review. See Act of April 26, 1928, 45 Stat. 466. Second, in 1948 the circuit courts of appeals were renamed the United States Courts of Appeals. Act of June 25, 1948, Section 43(a), 62 Stat. 870. The language of the 1948 Act delineating the jurisdiction of the courts of appeals is now found in 28 U.S.C. 1291, which grants to the courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States * * *."[15]

[14] See generally Payne, *The Abolition of Writs of Error in the Federal Courts*, 15 Va. L. Rev. 305 (1929). A great deal of confusion had arisen as to when an appeal was appropriate and when a writ of error should be used. Congress had attempted to alleviate this problem 12 years earlier (Act of September 16, 1916, Section 4, 39 Stat. 727), and it finally eliminated the problem by abolishing the writ.

[15] Appeals by the United States are governed by 18 U.S.C. 3731. For a history of the development of the right of the prosecution to appeal, see *United States* v. *Wilson*, 420 U.S. 332, 336–339; *Carroll* v. *United States*, *supra*.

2. Two themes run through this history. First, when Congress has perceived a need for more expansive appeal rights in criminal cases, it has provided them explicitly. Appellate jurisdiction is entirely a statutory matter, and courts are not free to expand their own jurisdiction in response to arguments that have not yet commended themselves to Congress. Second, whenever Congress has devised a statute pertaining to criminal appeals alone, it has either limited jurisdiction to review of convictions or sentences, or explicitly provided for interlocutory review. Compare 20 Stat. 354, 25 Stat. 656, and 26 Stat. 827, with 18 U.S.C. 3731. Any exception to the finality principle has been plainly expressed.

The Act of April 29, 1802, which granted Supreme Court jurisdiction on certificate of division, allowed interlocutory review, which Congress carefully circumscribed. The statute provided (Section 6, 2 Stat. 160–161) that Supreme Court resolution of a question raised on certificate of division was not to "prevent the cause from proceeding, if, in the opinion of the court, farther proceedings can be had without prejudice to the merits * * *." [16] In other statutes the restrictions

[16] Even so, this Court narrowly construed its jurisdiction to review on certificate of division. *United States* v. *Rosenburgh*, 7 Wall. 580, and *United States* v. *Avery*, 13 Wall. 251, held that review was unavailable where the division arose on a motion to quash the indictment. In *Avery* the motion to quash had challenged the court's jurisdiction over the offense. Despite a division on the question of jurisdiction, this Court dismissed the certificate on the authority of *Rosenburgh*, which had held there was no jurisdiction because the motion to quash "was clearly determinable as a matter of [the circuit court's] discretion" and because "the denial of the motion could not finally decide any right of the defendant," since the grounds asserted in the motion were "left to be availed of, if available, upon demurrer or motion in arrest of judgment." 7 Wall. at 583.

have been even more pronounced.[17] See 18 U.S.C. 3147 (appeal from decision setting conditions of release). Indeed, the requirement of finality was so much accepted as a precondition to appellate review that Congress' neglect to use the term "final" in describing what decisions were appealable has been held to afford no basis for allowing interlocutory review. *McLish* v. *Roff*, 141 U.S. 661, 665.

3. The intent of Congress to forbid interlocutory appeals in criminal cases except where explicitly author-

[17] Congress has enacted for the District of Columbia a provision allowing the government to take interlocutory appeals to the District of Columbia Court of Appeals from certain rulings made during the trial; that court must authorize the appeal and decide the case within 96 hours. 23 D.C. Code 104(d).

The Criminal Appeals Act, 18 U.S.C. 3731, explicitly sets out a right of interlocutory appeal for the prosecution. This statute, and 18 U.S.C. 2518(10)(b), which also provides for interlocutory appeals by the prosecution, conditions such appeals on the making of a certificate of good faith by a responsible public official. Both statutes also require expeditious resolution of the appeal. See also 28 U.S.C. 1826(b) (courts of appeals must act within 30 days on appeals in civil contempt cases).

In civil cases, too, interlocutory appeals are allowed only in carefully defined circumstances. 28 U.S.C. 1292(a) allows appeals as of right from orders granting or denying interlocutory injunctions; 28 U.S.C. 1292(b) allows interlocutory appeals by permission of the district court and the court of appeals, where resolution of an issue could materially advance the termination of the litigation. Other statutes pertain to but a single subject matter, and many of them are catalogued in *DiBella*. These examples suggest that Congress, far from using 28 U.S.C. 1291 as an authorization for interlocutory appeals in all cases not specifically provided for elsewhere, intended that Section 1291 would authorize, as it says, appeals from only "final" decisions.

ized is demonstrated most clearly by the Act of July 3, 1926, 44 Stat. 831, which provided:

> [N]othing contained in any Act of Congress shall be construed to empower the Court of Appeals of the District of Columbia to allow an appeal from any interlocutory order entered in any criminal action or proceeding * * *.

This statute was enacted to put a stop to a practice allowing interlocutory appeals by leave of court, which had begun just before the turn of the century. See *Ainsworth* v. *United States*, 1 App. D.C. 518, 520; D.C. Code § 226 (1901).

Congress enacted the statute to terminate pretrial legal maneuvering that threatened to delay criminal proceedings in one of the Teapot Dome cases. Three of the defendants, including former Secretary of the Interior Fall, had filed demurrers to their indictment, arguing that the indictment did not charge an offense, was based on an erroneous interpretation of an act of Congress, and was duplicitous.[18] The demurrers were overruled by the trial judge, but the court of appeals entered an order allowing an interlocutory appeal. See 67 Cong. Rec. 12990–12991 (1926). Senator Walsh, an active participant in the investigation of the scandal, introduced the bill that became the Act of July 3, 1926, in order to prevent further delay in these criminal cases. 67 Cong. Rec. 9884 (1926).

Reporting favorably on the bill, the Senate Judiciary Committee stated (67 Cong. Rec. 9968 (1926)): "[A]n appeal from an interlocutory order in a criminal case

[18] Demurrers in Cr. Nos. 43,324 and 43,325, Supreme Court of the District of Columbia, filed October 5, 1925, and November 3, 1925.

is an anomaly. No such procedure is authorized or tolerated in the Federal system generally * * *." The House Report (H.R. Rep. No. 1363, 69th Cong., 1st Sess. 2 (1926)) elaborated:

> [T]he allowance of [interlocutory] appeals has been given in civil cases but has not been recognized or provided for in criminal cases. The construction placed on the section of the District Code [Section 226] by the court is unusual and makes the practice in the District out of harmony with that obtaining elsewhere.
>
> * * * Delay in criminal cases is already a grave subject of general criticism and to allow appeals in interlocutory matters would serve to bring the administration of criminal law into greater discredit.

The Act passed, the court of appeals dismissed the appeal, the case went to trial, Fall was acquitted, and a substantial amount of time was saved. Werner and Starr, *Teapot Dome* 209 (1959). The particular circumstances that gave rise to that statute have passed,[19] but the House Committee's observations still reflect the legislative design.

C. THIS COURT CONSISTENTLY HAS HELD THAT DEFENDANTS IN FEDERAL CRIMINAL CASES MAY NOT APPEAL BEFORE A JUDGMENT OF CONVICTION HAS BEEN RENDERED

"[T]he whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act" (*Carroll* v. *United States*, *supra*, 354 U.S. at 399) demonstrates that in criminal cases there is no right of appeal by a defendant until the entire case has come

[19] The Act was repealed in 1948 as obsolete. 62 Stat. 865. See *Carroll* v. *United States*, *supra*, 354 U.S. at 412.

to a close and all questions concerning the propriety of a conviction can be reviewed at the same time. The wisdom of this course is obvious. Each federal criminal case presents a multitude of federal questions requiring resolution by the trial court. Does the indictment state an offense? Is the statute constitutional as applied to the defendant's conduct? Is particular evidence admissible? Has the accused voluntarily waived one or more of his procedural rights, whether constitutional or statutory in origin? Although the answer to any one question may influence the outcome of the litigation, the answer to any of the other questions may have greater influence. Although the trial court decides that the Double Jeopardy Clause does not bar the pending trial, it later may decide that the Speedy Trial Clause or the statute of limitations forbids additional proceedings or that critical evidence should be suppressed. If the trial proceeds to verdict, the jury may acquit.

The aphorism that "justice delayed is justice denied" applies with special force to criminal cases. There is a compelling societal interest both in the swift punishment of the guilty and in the prompt exoneration of the innocent. Cf. *Barker* v. *Wingo*, 407 U.S. 514, 519–521. But if each important constitutional question were resolved in a separate appeal before trial, litigation could be interminable. What is more, many of the questions would be presented in an analytical vacuum: pretrial resolution of a speedy trial argument, for example, is particularly difficult because the prejudice caused by the delay may be impossible to assess until the witnesses have testified. Resolution of many of the questions hypothetically presented in a case and potentially

affecting its outcome may become unnecessary in light of the resolution at trial of other questions. The time taken to decide questions that may prove to be academic would delay an appellate court's consideration of other pressing matters properly before it. During the time needed to decide the appeal, moreover, evidence may be lost and memories may fade. These considerations explain why this Court has set its face against piecemeal adjudication of criminal cases, why it has consistently required that "the whole case and every matter in controversy in it [be] decided in a single appeal." *McLish* v. *Roff*, *supra*, 141 U.S. at 665–666.

A final decision "in a criminal case means sentence." *Berman* v. *United States*, 302 U.S. 211, 212. See also *Parr* v. *United States*, 351 U.S. 513, 518. The meaning of this principle is illustrated by *Heike* v. *United States*, 217 U.S. 423, a case in which a defendant who claimed absolute immunity from prosecution as well as from conviction attempted to take a pretrial appeal from a decision requiring him to stand trial. We submit that the Court's decision in *Heike* controls the instant case.

Heike was indicted and pleaded absolute immunity from prosecution because he had previously been compelled to testify before a grand jury regarding the subject matter of the indictment. The plea was denied and the case was set for trial. Heike sought immediate review, pointing out that the immunity statute provided that no person compelled to testify "shall be prosecuted," and arguing that "[t]o permit the trial to proceed takes away that which never can be restored," namely the right not to be prosecuted (217 U.S. at 424). The judgment was thus final, Heike contended, and an

appeal should be allowed. The Court disagreed,[20] observing that the denial of Heike's plea had "not dispose[d] of the whole matter litigated," that is, "the right to convict the accused of the crime charged in the indictment." *Id.* at 429. The Court continued (*id.* at 430):

> As the case now stands, upon the plea of not guilty, upon which the issue raised must be tried to a jury, certainly the whole matter has not been disposed of. It may be that upon trial the defendant will be acquitted on the merits. It may happen that for some reason the trial will never take place. In either of these events there can be no conclusive judgment against the defendant in this case. It is true that in a certain sense an order concerning a controlling question of law made in a case is, as to that question, final. Many interlocutory rulings and orders effectually dispose of some matters in controversy, but that is not the test of finality for the purposes of appeal or writ of error. The purpose of the statute is to give a review in one proceeding after final judgment of matters in controversy in any given case. Any contrary construction of the Court of Appeals Act may involve the necessity of examining successive appeals or writs of error in the same case, instead of awaiting, as has been the practice since the beginning of the Government, for one review after a final judgment, disposing of all controversies in that case between the parties.

The Court analogized Heike's predicament to that of one whose plea of former jeopardy is rejected, and, in language especially pertinent here, it concluded that the cases should be treated alike (*id.* at 432–433):

[20] The Court had held in *Brown* v. *Walker*, 161 U.S. 591, 608–609, that a statute granting transactional immunity to a witness compelled to testify before the grand jury was constitutionally adequate even though "the witness * * * may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance."

> The Constitution of the United States provides that no person shall be twice placed in jeopardy of life and limb for the same offense, yet the overruling of a plea of former conviction or acquittal has never been held, so far as we know, to give a right of review before final judgment. In the case of *Rankin* v. *The State*, 11 Wall. 380, an attempt was made to bring to this court a judgment of a state court upon a plea in bar of former conviction in a capital case. But this court, speaking by Mr. Justice Bradley, said:
>
> "* * * [I]n no sense can that judgment be deemed a final one* * *" [21]
>
> It may thus be seen that a plea of former conviction under the constitutional provision that no person shall be twice put in jeopardy for the same offense does not have the effect to prevent a prosecution to final judgment, although the former conviction or acquittal may be finally held to be a complete bar to any right of prosecution, and this notwithstanding the person is in jeopardy a second time if after one conviction or acquittal the jury is empanelled to try him again.

The Court's reasoning in *Heike* was straightforward: the immunity statute created a right not to be tried as well as a right not to be convicted, but it did not create a right to take an interlocutory appeal. The right not to be tried was left to be vindicated in the trial court.[22] Nothing in the subsequent decisions of this

[21] Rankin was indicted for murder in Tennessee. He had been acquitted by court-martial of the same offense and accordingly interposed a plea of former acquittal. The trial court sustained the plea, but the Supreme Court of Tennessee reversed and remanded for trial. This Court held that it was without jurisdiction to review the Tennessee judgment.

[22] The Court not only declined to hear the interlocutory appeal but also refused to issue a writ of mandamus. *Ex parte Heike*, 30 S. Ct. 576. The Court ultimately considered the issue on the merits after Heike was convicted and rejected his claim. 227 U.S. 131.

Court has undermined the validity of *Heike* or the soundness of its approach.

In *Cogen* v. *United States*, 278 U.S. 221, the Court held that there was no appellate jurisdiction to review before trial an order refusing to suppress evidence that the defendant alleged had been unconstitutionally seized. Cogen argued that the order refusing to suppress was "final" because it would not later be reexamined by the trial court; this Court agreed and assumed that an erroneous denial of suppression might cause much inconvenience, expense and annoyance—it might even cause an unnecessary trial. That was not enough, however, for a denial of suppression could be reviewed on appeal from a judgment of conviction (278 U.S. at 224–225).

Eastman v. *Ohio*, 299 U.S. 505, summarily dismissed an appeal on the authority of *Rankin* and *Heike*.[23] *Cobbledick*, which we already have discussed, held that even third-party witnesses could not obtain review of orders affecting them until the conclusion of the trial proceedings, unless they were meanwhile held in contempt.[24]

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[23] See also *Polakow's Realty Experts, Inc.* v. *Alabama*, 319 U.S. 750.

[24] This principle has been modified in certain extreme situations. See *United States* v. *Nixon*, 418 U.S. 683. Cf. *Maness* v. *Meyers*, 419 U.S. 449, 458–468. It retains full vitality in ordinary cases, however. *United States* v. *Ryan*, 402 U.S. 530.

Cobbledick distinguished *Perlman* v. *United States*, 247 U.S. 7, upon which *amicus curiae* relies (Br. 5–6), as a case in which utterly no review of the third-party's claims would be available without prompt appeal; in *Perlman* the disputed documents were in the hands of the prosecution and the third party thus could not obtain review by standing in contempt. As the Court pointed out, that is an unusual situation, and *Perlman* does not stand for a broad principle of jurisdiction. See 309 U.S. at 328–329.

In *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, the defendants in a criminal antitrust case pleaded that the district court lacked jurisdiction and that they were immune. When the court rejected the plea, the defendants sought mandamus. This Court conceded that there may be enormous costs in taking part in a trial that never should occur, but it held that interlocutory review should not be allowed. It wrote (319 U.S. at 30):

> Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take if Congress contemplated in providing that only final judgments should be reviewable. Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases.

Parr v. *United States*, 351 U.S. 513, reaffirmed *Heike* and held that an accused could not obtain pretrial review of an order dismissing an indictment in one district and allowing a prosecution to proceed in another. Parr had argued, not without foundation, that the order dismissing one of the indictments was "final," and he protested that the proceedings on the second indictment were void from their inception. That was not enough, the Court concluded: "The testing of the effect of the dismissal order must abide petitioner's trial, and only

then, if convicted, will he have been aggrieved" (351 U.S. at 517). The Court held that the decision was not "final" because there was no judgment of conviction (*id.* at 518), and it concluded that a defendant's desire to avoid a trial that may turn out to be unnecessary is insufficient to set up a right of appellate review before trial (*id.* at 519).[25]

Carroll v. *United States*, *supra*, held that the government could not appeal from a pretrial order suppressing evidence, even when that order would sound the death knell of the prosecution. The likelihood that the erroneous decision would lead to the acquittal of a guilty defendant did not support an appeal, the Court reasoned, because "[a]ppeal rights cannot depend on the facts of a particular case" (354 U.S. at 405). It concluded (*id.* at 406): "Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable." If problems of this sort call for interlocutory review, the Court held, Congress rather than the Court must provide for that review (*id.* at 407–408).

DiBella v. *United States*, *supra*, reaffirmed *Cogen* and *Carroll*. The Court once more pointed out that decisions are "final" for purposes of appellate review in criminal cases only after the proceedings have ended

[25] The Court also held that mandamus would not lie to prevent the arguably unnecessary trial. Citing *Roche*, the Court concluded that mandamus would not be allowed to substitute for the appeal that would be available after a conviction (*id.* at 520–521).

in conviction.[26] The defendants had argued that suppression motions involve issues "collateral" to the general issue of guilt or innocence, and that suppression decisions made before trial are "final" because they finally determine the admissibility of evidence. The Court responded that such decisions are neither collateral nor final because they vitally affect the outcome of the prosecution itself; that being so, they can be reviewed on appeal from a judgment of conviction (369 U.S. at 127). *DiBella* also observed: "Congress has recognized the need of exceptions for interlocutory orders in certain types of proceedings where the damage of error unreviewed before the judgment is definitive

[26] *Amicus curiae* (Br. 5) makes much of the fact that 28 U.S.C. 1291 speaks of "final decisions" rather than "final judgments." The same language was at issue in *Heike* and *DiBella*, however, and the Court found it to be of no moment. Congress has historically used the terms interchangeably. See 1 Stat. 77–78, 5 State. 539, 9 Stat. 450, 455, 10 Stat. 176, 14 Stat. 386, 387, 15 Stat. 44, Rev. Stat. §§ 763, 764. Compare Rev. Stat. § 702 with § 1911.

The term "final decision" in Section 1291 is derived from the 1891 Circuit Court of Appeals Act; prior to its enactment this Court had decided that "final decision" and "final judgments and decrees" were identical in import. *Harrington* v. *Holler*, 111 U.S. 796. Moreover, as *McLish* v. *Roff*, *supra*, makes clear, the Court has implied a requirement of finality in jurisdictional statutes even when it was not well expressed. See also *Ex parte Tiffany*, 252 U.S. 32, 36. It is also of interest that when Congress first used the term "final decision" in the Circuit Court of Appeals Act, the criminal jurisdiction of the circuit courts of appeals was limited to petty crimes. *In re Claasen*, *supra*, 140 U.S. at 204–205. The words "final decisions" as applied to felony cases did not acquire meaning until Congress transferred to the circuit courts jurisdiction that previously had belonged to this Court. The transferred jurisdiction permitted appeals only from judgments of conviction. 29 Stat. 492, 36 Stat. 1133, 1157.

and complete * * * has been deemed greater than the disruption caused by intermediate appeal" (*id.* at 124). Each of these exceptions, however, was addressed to civil actions (*id.* at 126), and the Court therefore concluded that it should not create a similar exception for criminal cases.

The conclusion of *DiBella* that appeals lie in criminal cases only with explicit legislative authorization is no less sound today. The costs of delay in criminal cases are great. The Speedy Trial Act of 1974, 18 U.S.C. (Supp. V) 3161 *et seq.*, demonstrates Congress' desire to expedite criminal cases to the greatest extent feasible. Congress now has authorized interlocutory appeals in criminal cases (only by the prosecution) in two carefully designed provisions (18 U.S.C. 2518(10)(b) and 3731), both of which address particular problems and call for prompt appellate decisions. Interlocutory appeals cannot be taken under these statutes without a certificate of good faith by a responsible public official. See also 18 U.S.C. 3147 (appeals from orders setting bail).

We submit that it is utterly implausible to believe that Congress, which has created these limited rights of interlocutory appeal with such care, could have intended 28 U.S.C. 1291 to serve as a catch-all, authorizing interlocutory appeals in any other situation that might be thought to be "important." That, however, is the interpretation several courts of appeals have given to Section 1291 (see pages 13–14, *supra*). They have done so because they believe that double jeopardy claims deserve special treatment, not only because a double jeopardy claim may state a good reason not to hold a

trial at all but also because such claims are deemed to be "collateral" to the other issues in the prosecution. We now turn to an examination of these arguments.

D. THERE IS NO SUFFICIENT JUSTIFICATION FOR TREATING DOUBLE JEOPARDY CLAIMS DIFFERENTLY FROM OTHER CLAIMS FOR PURPOSES OF INTERLOCUTORY APPEAL

1. *Double jeopardy claims do not present issues "collateral" to the prosecution*

The courts of appeals that have allowed pretrial appeals from the rejection of a claim of former jeopardy have relied upon the "collateral order doctrine" articulated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545–547. *Cohen* was a diversity action. Before trial the question arose whether a state statute requiring the plaintiff to post security applied in federal court. The district court thought not; the court of appeals reversed and ordered the posting of security. This Court concluded that the court of appeals had jurisdiction.

It began with the settled principle that there can be no appeal before trial, "even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results" (337 U.S. at 546). The Court concluded, however, that an order to post security had nothing to do with the merits of the litigation, and that the question whether the plaintiff should have been required to post security could not be reviewed on appeal from a judgment in defendant's favor. The order with

respect to security therefore fell "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred" (*ibid.*). The Court concluded (*id.* at 546–547): "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."

Our discussion to this point demonstrates that the principles governing appeals in civil cases cannot be transferred so easily to criminal cases, with their different jurisdictional development and greater need for expedition. However that may be, it is clear that the rejection of a double jeopardy claim is not a collateral order within the meaning of *Cohen*. Quite the contrary, a claim of former jeopardy calls into question the core issue of the case—"the right to convict the accused of the crime charged in the indictment" (*Heike, supra*, 217 U.S. at 429; *Parr* v. *United States, supra*, 351 U.S. at 518–519). A double jeopardy claim is simply one reason why there should be no conviction. If the district court errs in favor of the government, its error can be corrected (if a conviction ensues) by reversal on appeal.

The best evidence that the double jeopardy claim is not "collateral" is the fact that it cannot be litigated without blocking further proceedings in the case. The question of security litigated in *Cohen* could be resolved without halting other proceedings. The related question of the amount of bail, litigated in *Stack* v. *Boyle*, 342

U.S. 1—the only occasion this Court has applied *Cohen* to a criminal case—also was wholly independent of any questions concerning the propriety of the prosecution and the validity of any conviction. The question concerning the defendant's right to release prior to trial does not merge with a final judgment, and an appellate court can consider bail questions while the trial court moves on to other things, as Mr. Justice Jackson observed in his concurrence (342 U.S. at 12).

2. *A right of interlocutory appeal is not necessary to obtain "full enjoyment" of the rights protected by the Double Jeopardy Clause*

The double jeopardy claim is neither severable from nor collateral to the main issues of the criminal trial. The courts of appeals that have entertained pretrial double jeopardy appeals have observed, however, that the Double Jeopardy Clause protects against repetitious trials as well as against multiple convictions, and they have argued that the accused cannot obtain the "full enjoyment" of his right to be free of repetitious trials unless interlocutory review is available. Although the premise of this argument is correct,[27] the conclusion does not follow.

Judge Friendly has characterized as "seductive" the observation that "a defendant is entitled under some circumstances to be protected from an unlawful trial and not simply from an unlawful conviction" (*Alessi*

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[27] See *Breed* v. *Jones*, 421 U.S. 519; *Green* v. *United States*, 355 U.S. 184, 187–188.

II, *supra*; see App., *infra*, p. 8A). And so it is.[28] There appears to be but a short step from that observation to the conclusion that there must be a right of interlocutory appeal, else defendants no longer could have the "full enjoyment" of their constitutional rights. The step from the observation to the conclusion rests, however, on the unarticulated minor premise that appellate review of claims to a particular right is *part* of its full enjoyment. Use of that minor premise, however, begs the very question presented here—whether Congress

[28] Part of its seductiveness comes from the fact that it is not entirely accurate. The Double Jeopardy Clause does not always preclude a second trial as well as a second conviction. Principles of collateral estoppel, which are incorporated in the Double Jeopardy Clause (*Ashe* v. *Swenson*, 397 U.S. 436), are rules of evidence. Once facts have been found by the trier of fact in one case, the prosecution cannot seek to persuade a second jury to the contrary. But collateral estoppel may operate to exclude some proof in a criminal case without forbidding all of it; in this context, the Double Jeopardy Clause is a rule of evidentiary exclusion and should be treated no differently from other reasons to exclude evidence, such as violations of the Fourth Amendment. Claims founded upon *Ashe* therefore should be controlled by *DiBella*, regardless of the outcome of the instant case.

This Court appeared to hold in *Harris* v. *Washington*, 404 U.S. 55, that collateral estoppel claims based upon *Ashe* state reasons why there should be no trial at all. Although this observation may be accurate when the evidence in the second prosecution is identical to that in the first, we submit that it cannot be generalized to all collateral estoppel cases. It is not difficult to imagine cases in which the evidence to which collateral estoppel might apply is only tangentially relevant to the central issues in the prosecution. See *Phillips* v. *United States*, 502 F.2d 227 (C.A. 4), set aside in part *en banc*, 518 F.2d 108, vacated and remanded, 424 U.S. 961, conviction affirmed on remand, 538 F.2d 586.

has established a right of interlocutory appeal in criminal cases. To reason that there must be an appellate test of every claim that a district court has erred avoids the question by assuming the conclusion. It is quite likely, in light of the history we have recounted at pages 19–27, *supra*, that Congress intended the trial courts to be the only tribunals to pass upon certain claims in criminal cases. As the Court put it in *Carroll* v. *United States*, *supra*, 354 U.S. at 406, some interlocutory decisions are "never satisfactorily reviewable."

Many of the cases in which this Court has declined to allow interlocutory appeal involved claims that the appeal was necessary to obtain "full enjoyment" of the asserted right. In *Heike* the defendant asserted absolute immunity under a statute forbidding the prosecution itself; the statutory immunity had been conferred as a substitute for the constitutional privilege against self-incrimination. In *Parr* the defendant asserted that further proceedings were absolutely barred, in light of certain constitutional provisions, by the dismissal and reindictment. In *Roche* the defendants asserted a form of absolute immunity. In the other cases we have discussed, including *Cobbledick* and *DiBella*, the defendants argued that they should not be put to the time and expense of trial when the proceedings were (they argued) certain to be so infected with constitutional error that a reversal on appeal was inevitable. The Court has held, however, that arguments about inconvenience and expense are not a satisfactory substitute for a statute authorizing appeals.

A rule allowing immediate appeals of pretrial orders rejecting double jeopardy claims would rest, as a legis-

lative matter, on a number of empirical assessments. A legislature would decide whether double jeopardy claims are now being erroneously rejected in unacceptable numbers by district courts and whether, if an appeal were allowed, those errors would be corrected. It would then weigh these gains against the drawbacks of allowing pretrial appeals, foremost among which are the delay that will be engendered and the costs that will be incurred in the many cases where the double jeopardy claim was properly rejected by the trial court, but the accused nonetheless appeals.[29]

It is far from clear that the benefits of pretrial appeals outweigh the costs: petitioners have not shown, for example, that significant numbers of valid double jeopardy arguments are rejected by the district courts.[30] In any event, that choice is not for this Court; it is for Congress, and Congress has declined to extend to defendants in criminal cases the right of interlocutory appeal that it has made available to the government in carefully limited situations (see 18 U.S.C. 2518 (10) (b) and 3731).

A judge-made rule permitting interlocutory appeals whenever a defendant asserts a right not to be tried would be illimitable, and it would lead to the very review by piecemeal that Congress intended to avoid. As Judge Friendly put it in *Alessi II* (App., *infra*, pp. 27A–28A; footnote omitted):

[29] Another cost arises in that small class of cases in which the district court correctly rejects a double jeopardy claim, a court of appeals erroneously reverses, and the matter must be set to rights in this Court—all prior to trial.

[30] See note 6, *supra*.

> We have little doubt that * * * once *Cohen* is construed to have created a "right not to be tried" exception to the final decision rule in criminal cases, it will be hard to limit the claims for such review which counsel will advance. This is not just an "alarming specter," as the Government put it in *Lansdown*, 460 F.2d at 172; in four short years the "specter" has acquired a number of earthly embodiments.

The Fourth Circuit has held that the Speedy Trial Clause creates a "right not to be tried" that can be the subject of a pretrial appeal (*United States* v. *MacDonald*, *supra*); the Second Circuit has held that a plea bargain can create a "right not to be tried" that can be the subject of a pretrial appeal (*Allessi I*, *supra*); in all probability, this is only the beginning.[31] To allow pre-

[31] Numerous provisions of the Constitution arguably forbid not only a conviction but also the judicial proceedings leading to a conviction:

(1) The Speech and Debate Clause (Article I, Sec. 6, cl. 1) provides that a member of Congress "shall not be questioned in any other Place" for his official acts. See *McSurely* v. *McClellan*, 521 F.2d 1024 (C.A.D.C.) (rehearing *en banc* pending on merits only), and *Rowley* v. *McMillan*, 502 F.2d 1326 (C.A. 4), the former holding that in civil cases an immediate appeal lies from a pretrial order rejecting a defense of legislative or official immunity and the latter that mandamus lies. Cf. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491; *Gravel* v. *United States*, 408 U.S. 606.

(2) The Grand Jury Clause of the Fifth Amendment provides that no individual shall be "held to answer" for a capital or infamous crime except upon indictment. Because this protection may be implicated any time an indictment is altered (*Ex parte Bain*, 121 U.S. 1), it could be a fruitful source of pretrial appeals, even when the alteration is perfectly proper.

(3) Trials instituted as part of a bad faith campaign to "chill" First Amendment rights also might fall into a prohibited category. See *Dombrowski* v. *Pfister*, 380 U.S. 479. Cf. *Allee* v. *Medrano*, 416 U.S. 802 (federal injunction against state proceedings used to harass people exercising other con-

trial appeals simply upon the assertion of the defendant that prompt review is necessary to ensure "full enjoyment" of his constitutional rights is to erode, if not to discard, the principle that "[t]he burden of a possibly needless trial [is] not sufficient reason for instant appealability" (*Alessi II;* App., *infra*, p. 15A).[32]

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stitutional rights). Harassment and bad faith are easy to allege and difficult to disprove. Obscenity prosecutions, in which the defendant asserts that the materials are absolutely protected by the First Amendment, also could lead to pretrial appeals.

(4) Trial also might be barred if the prosecution were founded on racially discriminatory reasons (*Yick Wo* v. *Hopkins*, 118 U.S. 356) or were the result of unconstitutionally discriminatory enforcement. Such claims, while seldom meritorious (see *Oyler* v. *Boles*, 368 U.S. 448, 456), are often made.

(5) It is not difficult to invent other cases, and this Court's decisions under the civil rights removal statutes (*Johnson* v. *Mississippi*, 421 U.S. 213; *Georgia* v. *Rachel*, 384 U.S. 780; *Greenwood* v. *Peacock*, 384 U.S. 808) discuss circumstances under which a trial itself would be a violation of constitutional rights.

[32] We do not contend that all other assertions that there is a "right not to be tried" are equivalent to double jeopardy claims. The Double Jeopardy Clause creates a special interest in the avoidance of the trial itself that is not duplicated even in other claims of a right not to be tried. For example, although the Fourth Circuit has held in *United States* v. *MacDonald*, *supra*, that the Speedy Trial Clause of the Sixth Amendment creates a right not to be tried, the individual's interest in being free of trial is not of paramount concern under a Sixth Amendment analysis. The Speedy Trial Clause is primarily designed to foster the interests of society in the expeditious resolution of criminal cases and to shield the individual against prejudicial delays. See *Barker* v. *Wingo*, *supra*, 407 U.S. at 519–522. See also *United States* v. *Ewell*, 383 U.S. 116, 120. The delay, not the trial itself, offends against the constitutional guarantee, and a "right not to be tried" is simply incidental to the remedy for delay. Similarly,

This case and others in the same vein illustrate the dangers of piecemeal review. In almost all of the cases the courts of appeals have assumed jurisdiction over the double jeopardy claim only to reject the defendant's position on the merits. In the meanwhile valuable time has been lost. In the instant case petitioners were convicted and won reversal on appeal. That decision was handed down on April 21, 1975, yet the retrial that the court of appeals ordered still has not begun. Petitioners' arguments on the merits are insubstantial (see pages 56–67, *infra*), but have afforded petitioners lengthy delay.

Other examples are even more unsettling. Paul Hankish was convicted in July 1973 for crimes committed in 1971. He argued on appeal that the evidence was insufficient to support the conviction and that certain evidence was improperly admitted. On October 28, 1975, the court of appeals agreed with the latter argument but rejected the former, and it remanded for a new trial. *Martin* v. *United States*, 528 F.2d 1157 (C.A. 4). On remand Hankish persisted in his argument that the evidence was insufficient, and he added the argument that, because of this, a second trial would be barred by the Double Jeopardy Clause. The district court rejected this claim, which had been authorita-

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although a plea bargain might create a right not to be tried, the enforcement of such an essentially contractual right is of lesser urgency than the enforcement of the right not to be tried created by the Double Jeopardy Clause. We therefore believe that a decision that double jeopardy claims can be raised on appeal prior to trial should not be extended to other "rights not to be tried" that have different purposes and historical meanings.

tively foreclosed by the court of appeals, and Hankish immediately appealed. The trial was stayed; the court of appeals, citing *United States* v. *Lansdown*, *supra*, assumed jurisdiction over the appeal; on July 1, 1976, the court affirmed (No. 76–1334). Now Hankish has filed a petition for a writ of certiorari (No. 76–135), and his trial, for events that occurred long ago, still is blocked. It seems fair to say that in many cases even a preposterous double jeopardy claim can produce a lengthy delay for defendants who find delay advantageous.

Perhaps occasional delay might seem to be a necessary price to pay for ensuring the vindication of many just claims. Common sense indicates, however, that the reality will be the reverse: because the district courts resolve correctly the vast majority of claims presented to them,[33] the price for ensuring the pretrial vindication of a few just but erroneously rejected claims would be lengthy delay in many cases while defendants appealed from correct decisions.[34] We submit that the Court should hold that double jeopardy claims, like the other constitutional claims that arise in the course of a criminal case, must await resolution by appeal from a final judgment of conviction.

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[33] To the extent district courts err in the resolution of double jeopardy claims, they have every incentive now to err in favor of the accused. If an indictment is erroneously dismissed the government can appeal under 18 U.S.C. 3731; district courts, knowing this and desiring to avoid unnecessary burdens on the accused and on their own crowded dockets, may well resolve close questions in favor of the accused.

[34] See Orfield, *Criminal Appeals in America* 40 n. 29, 92 (1939).

3. *Pretrial review by this Court of decisions of state courts does not provide support for pretrial review by federal courts of appeals of interlocutory decisions in federal criminal cases*

In *Alessi II* Judge Friendly expressed concern that *Heike* and similar cases had been eroded by recent decisions of this Court reviewing, under 28 U.S.C. 1257, interlocutory decisions of state courts. A typical case is *Mills* v. *Alabama*, 384 U.S. 214, 217–218, in which Mills had been indicted for the state crime of publishing a political editorial on election day. The trial court sustained a demurrer on First Amendment grounds, the Supreme Court of Alabama reversed and remanded for trial, and this Court denied the State's motion to dismiss Mills' appeal. It concluded that the decision remanding the case for trial was "final" because it had resolved the federal issue controlling the case, and further proceedings in the state court would be nothing but formalities.[35]

After thoroughly discussing these cases Judge Friendly concluded that they do not support immediate review of double jeopardy claims in federal cases (App., *infra*, pp. 15A–22A), and we think that he is right. Federal review of decisions of state *appellate* courts involves considerations quite different from those presented by the question whether there should be any appellate interruption of ongoing *trial* proceedings.

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[35] See also *Brady* v. *Maryland*, 373 U.S. 83, 85 n. 1; *California* v. *Stewart*, 384 U.S. 436, 498 n. 71 (decided *sub nom. Miranda* v. *Arizona*); *Harris* v. *Washington*, *supra*; *Colombo* v. *New York*, 405 U.S. 9; *Turner* v. *Arkansas*, 407 U.S. 366. *Harris*, *Colombo* and *Turner* involve double jeopardy claims.

In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476–487, the Court considered and analyzed the many cases that have involved review under 28 U.S.C. 1257 prior to final judgment. The analysis revealed that state criminal cases reviewed under Section 1257 have two things in common: first, the sole federal question was properly presented and had been finally decided, so that a decision on that question by this Court could terminate the litigation; second, the state courts already had countenanced pretrial review of the claims presented, so that additional review by this Court merely extended a delay that state procedure permitted. In none of them was there a prospect of piecemeal review of multiple federal claims.[36] See 420 U.S. at 477–478.

In a federal criminal case, by contrast, every question is a federal question. The prospect of piecemeal resolution of these questions therefore looms as an important consideration in deciding whether to allow interlocutory appeals. Moreover, although in the state cases the Court merely extended a delay already countenanced by state procedures,[37] the central question

[36] This is true as well of civil cases after *Cox Broadcasting* in which the Court has disposed of federal questions before final judgment. See, *e.g.*, *Fisher* v. *District Court*, 424 U.S. 382; *American Motorists Insurance Co.* v. *Starnes*, No. 74–1481, decided May 19, 1976, slip op. 5 n. 3; *City of New Orleans* v. *Dukes*, No. 74–775, decided June 25, 1976.

[37] See generally *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558, upon which the Court relied in *Harris* v. *Washington*, *supra*. A state system of appellate review "ultimately includes the certiorari or appellate jurisdiction of this Court" (*Lefkowitz* v. *Newsome*, 420 U.S. 283, 290 n. 6), and therefore, in a very real sense, the question of the "finality" of a case and its suitability for review under Section 1257 depends upon state law; unless state law creates the beginnings of appellate review before trial, Section 1257 does not provide for a continuation. See *Costarelli* v. *Massachusetts*, 421 U.S. 193 (state rule requiring a defendant to participate in a second trial in order to obtain review of errors in the first trial); *Arceneaux* v. *Louisiana*, 376 U.S. 336 (denial of request for preliminary hearing is not "final" because state court system does not allow interlocutory review).

presented by the instant case is whether Congress has countenanced *any* pretrial review and disruption. We submit, therefore, that this Court's decisions under Section 1257 do not provide support for the court of appeals' decision to assume jurisdiction of the instant case.[38]

E. COURTS OF APPEALS DO NOT HAVE THE AUTHORITY TO RESOLVE "PENDENT" CLAIMS THAT DO NOT INVOLVE THE LOSS OF A "RIGHT NOT TO BE TRIED"

The court of appeals apparently assumed jurisdiction of the appeal in the instant case on the authority of *United States* v. *DiSilvio*, *supra*. *DiSilvio*, however, did not involve a statutory claim pendent to the double jeopardy claim. The only court of appeals that has explicitly considered whether such claims should be resolved before trial has concluded that they should not. *United States* v. *Barket*, *supra*. Yet the court of appeals here disposed of both the double jeopardy claim and the statutory claim presented by petitioners.

[38] The analog to Section 1257 in federal criminal cases is 28 U.S.C. 1254(1). Under Section 1254(1) a defendant who is convicted at trial and secures a remand by the court of appeals could seek certiorari, arguing that he was entitled to a dismissal of the indictment. But this right of review does not imply that he could have taken an interlocutory appeal *to* the court of appeals.

We submit that it erred in doing so, even if (contrary to our arguments) it had jurisdiction over petitioners' double jeopardy claim.

An order denying a motion to dismiss an indictment for failure to state an offense would not by itself be appealable. It is not a "collateral" order in any sense; indeed, it touches on the essence of the case. It may finally resolve a legal issue, but that is not enough; the "finality" justifying a pretrial appeal in a case like this one arises, if at all, not from the fact that a legal issue has been finally resolved, but from the fact that the legal issue comprises a claim, founded on the Constitution, of a right not to be tried at all. The justification for immediate resolution arises from the perceived need to ensure full enjoyment of that constitutional right. Nothing of the sort is implicated in a claim that the indictment does not state an offense.

Practical considerations strongly counsel against allowing statutory claims to ride piggyback on double jeopardy appeals. If defendants have serious statutory arguments, it would not be difficult in many cases for them to invent a claim to which the apellation "double jeopardy" could be attached. The double jeopardy argument might be frivolous, but it could bring proceedings to a standstill while the court of appeals devoted its energies to the more serious statutory arguments. There is incalculable potential for delay in appeals of this sort. They should be avoided not only because of this potential for delay, but also because they would compel the courts of appeals to devote precious resources to the resolution of claims that may become moot in light of later developments.

There is no precedent for allowing nonappealable issues to be carried piggyback on a permissible interlocutory appeal. The appeal of the denial of an interlocutory injunction, permissible under 28 U.S.C. 1292 (a), does not allow the appellant to obtain review of the district court's disposition of preliminary issues pertinent to appellant's request for damages.[39] The rationale for interlocutory review of the double jeopardy claim is that it is severable from, and in need of review before, the other issues in the case. It would make a mockery of this rationale if the double jeopardy claim were then used as a bootstrap to review the remainder of the issues in the case, as the court of appeals did here.[40]

F. IF SOME FORM OF INTERLOCUTORY APPELLATE REVIEW IS CONSIDERED NECESSARY, IT SHOULD BE BY MANDAMUS, NOT APPEAL

We have argued that the possibility of mistaken decisions by trial courts rejecting meritorious double jeopardy claims is not a sufficient reason to allow appeal in every case prior to trial. One of the underpinnings of this argument has been that an appeal on a double jeopardy claim, to be effective, must bring other

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[39] Except insofar as those issues may be common to those that must inevitably be reached to decide the appeal relating to the injunction.

[40] *Aldinger* v. *Howard*, No. 74-6521, decided June 24, 1976, *United Mine Workers* v. *Gibbs*, 383 U.S. 715, and similar pendent jurisdiction cases have nothing to do with the problem at hand. In *Aldinger* and *Gibbs* the question to be decided was whether certain causes of action against certain parties would be heard in federal or state court; here the question is one of timing of appellate review within a single court system.

proceedings in the district court to a halt; allowing appeals therefore would produce lengthy delay in many cases in order to afford relief in a few cases where error has been committed. The Court ought not to upset the settled rule that defendants cannot take interlocutory appeals in criminal cases, but if, contrary to our arguments, the Court should conclude that double jeopardy claims cannot be reviewed effectively after trial and that immediate appellate review of some kind is necessary, it should hold that mandamus, rather than appeal, is the proper device. Mandamus might provide relief from the rejection of a valid double jeopardy claim where the error is blatant and the impending harm great; at the same time, because mandamus is a discretionary remedy, its use would not create the substantial potential for delay that inheres in appeals.

This Court's decisions concerning the availability of mandamus before trial in criminal cases look both ways. A number of decisions indicate that, where Congress has not provided for interlocutory appeal, mandamus cannot be used as a substitute means of review, for that would frustrate the Congressional plan. See, *e.g.*, *Will* v. *United States*, 389 U.S. 90;[41] *Parr* v. *United States*, *supra*, 351 U.S. at 520–521; *Roche* v.

[41] We believe that the rationale of *Will* has been substantially undermined by the recent amendments to the Criminal Appeals Act, 18 U.S.C. 3731, which provide for interlocutory appeals by the government. Because Congress intended to afford the prosecution liberal access to appellate review in all cases except those where the Double Jeopardy Clause would bar further proceedings on remand (see *United States* v. *Wilson*, 420 U.S. 332, 336–339), it is now more appropriate than

Evaporated Milk Association, *supra*. These cases also indicate that the ultimate availability of appeal after a judgment of conviction is an independent reason why mandamus will not issue. Cf. *Kerr* v. *United States District Court*, No. 74–1023, decided June 14, 1976. Thus, these cases appear to say that mandamus will not lie both when an appeal is available and when it is not. *Roche* and *Parr* doubtless state the rule applicable to the great majority of cases; if it were otherwise, the final judgment rule would be substantially eroded.

But the rule is not absolute. Shortly after it decided *Roche*, the Court held in *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196, and *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, that mandamus would issue before trial in a criminal case when the imposition of private hardship amounted to a usurpation of power. The Court acknowledged that "[i]t is evident that hardship is imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment. But such hardship does not necessarily justify resort to * * * extraordinary writs as a means of review" (*Alkali Export*, *supra*, 325 U.S. at 202). This principle was tempered, however, by the holding that mandamus is available, in the court's discretion, when the district court's decision amounts

it was at the time *Will* was decided for courts of appeals to issue pretrial writs of mandamus. Such pretrial writs in criminal cases are particularly appropriate because errors in favor of the accused that produce an acquittal are unreviewable, whereas errors in favor of the prosecution can be reviewed and corrected if the case ends in a conviction.

to "not mere error but usurpation of power" (*DeBeers*, *supra*, 325 U.S. at 217).

The cases, taken together, support the principle that mandamus will lie when the district court has clearly overstepped its authority or refused to exercise the authority with which it is endowed. So, for example, if a district court refused to rule on a defendant's motion to dismiss the indictment on double jeopardy grounds, mandamus would lie to compel the court to act. If the district judge were known to the court of appeals as one who regularly rejected double jeopardy claims regardless of their merits, mandamus would perhaps lie to correct this abuse. See *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, affirming the issuance of mandamus forbidding a district judge to refer an antitrust case to a master; both the court of appeals and this Court relied upon the fact that the district judge routinely abused his power by making such references. Moreover, mandamus would lie if the district court acted where it had no power to do so. *Schlagenhauf* v. *Holder*, 379 U.S. 104, is one of many examples.[42]

[42] See also, *e.g.*, *United States* v. *Norton*, 539 F.2d 1082 (C.A. 5) (mandamus is appropriate where a district judge reduces sentence after the time provided by Fed. R. Crim. P. 35); *Board of Parole* v. *Merhige*, 487 F.2d 25 (C.A. 4), certiorari denied, 417 U.S. 918 (mandamus is appropriate where a district judge grants a discovery order of a sort completely beyond his power); *United States* v. *Werker*, 535 F.2d 198 (C.A. 2), certiorari denied *sub nom. Santos-Figueroa* v. *United States*, November 1, 1976 (No. 76–5270) (mandamus is appropriate where a district judge engages in plea bargaining with a defendant in violation of Fed. R. Crim. P. 11). The central feature in these cases and others like them is that the judge, acting beyond the scope of his power, took an action that would be viewed by no other means; whether his particular decision was right or wrong thus was irrelevant to the threshold question of the power to entertain a mandamus petition.

The most difficult questions arise where, as here, the district judge has both the power and the duty to rule upon the motion, and the defendant alleges that the judge erred, not that he acted arbitrarily or outside the legitimate bounds of his power. We think that a claim of simple error—such as that made here—is insufficient to permit the issuance of mandamus. A party seeking pretrial mandamus in a criminal case must show more: flagrant abuse of power, callous disregard for the applicable principles, or action where there is no power to act. This is the standard articulated in *LaBuy* and *Schlagenhauf* for the use of "supervisory" mandamus, and we believe that it should be applied in criminal cases as well as civil. Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595 (1973).

The availability of mandamus under this standard would allow courts of appeals to correct abuses by district judges who reject seemingly meritorious double jeopardy claims without giving them serious consideration. This would go far to alleviate the concern that the denial of a right of interlocutory appeal would expose defendants to unfair or vexatious treatment, but it would at the same time avoid unnecessary review by piecemeal and prevent extensive delays in cases free from error. As Judge Friendly wrote in *Alessi II* (App., *infra*, p. 22A), "a court of appeals has the opportunity of utilizing 'supervisory' or 'advisory' man-

damus to correct any truly egregious error of a district court * * *. This resource, usable on a selective basis, * * * dictates against broad indentation of the final decision rule, especially in criminal cases."

II

A RETRIAL OF PETITIONERS WOULD NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE

If the Court agrees with our submission that appellate resolution of petitioners' double jeopardy arguments must await review of the entire case, should petitioners be convicted, then it should vacate the judgment of the court of appeals and remand this case for trial. If, however, it concludes that pretrial appeals are permissible, at least as to double jeopardy claims, then it must consider whether a second trial of petitioners would violate the Double Jeopardy Clause. We accordingly turn to a discussion of petitioners' double jeopardy arguments.

The one-count indictment charged petitioners with violating the Hobbs Act, 18 U.S.C. 1951(a). It charged (A. 5–6):

> That * * * Larry Starks, Clarence Louis Starks, Alonzo Robinson, Donald Everett Abney, and Merrill Albert Ferguson, did unlawfully and willfully conspire and attempt to obstruct, delay and affect [interstate] commerce * * * by extortion * * *, that is to say, by then and there attempting to obtain from * * * Ulysses J. Rice * * * money * * * to be paid in order to continue in the business of selling alcoholic beverages contracted for and obtained in interstate commerce, the attempted obtaining of said property * * * being then intended to be accomplished * * * by the wrongful use * * * of * * * threatened force, violence and fear * * *.

Petitioners argued before trial that the indictment is duplicitous because it charges both conspiracy and attempt. The prosecutor argued that it is not duplicitous, and the trial court directed the government to file a bill of particulars setting forth (515 F.2d at 117, emphasis added by court of appeals):

> A statement as to whether the government intends to proceed to prove either a conspiracy, or an attempt to obstruct, delay and affect commerce and the movement of articles and commodities therein by extortion, *or both*.

The prosecutor responded that he intended to prove both offenses. Defense counsel asked the court to require the prosecutor to elect between the charges, but the court declined (A. 8; 515 F.2d at 117).

The trial court recognized that the indictment charges two crimes, and it accordingly required the prosecutor to prove both of them. It instructed the jury that it could find any of petitioners guilty only if it concluded beyond a reasonable doubt that he had both conspired to extort and committed attempted extortion.[43]

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[43] The court instructed the jury:

> [T]he defendants are charged not with the so-called substantive offense itself but rather with a conspiracy and attempt to obstruct, delay and affect interstate commerce by extortion. If the jury should find beyond a reasonable doubt that there was a conspiracy and an attempt to extort money from Mr. Rice, the natural and probable consequences of which conspiracy and attempt, if successfully carried out, would be to obstruct, delay and adversely affect interstate commerce in any way or degree, the offense charged in the indictment of conspiracy and attempt would be complete, and the jury could properly convict all defendants found beyond a reasonable doubt

Following a conference regarding counsel's objections to the charge, the trial court reinforced these instructions by telling the jury, immediately before it retired to deliberate (10 Tr. 60):

> I would also point out that in the indictment it is charged that the defendants were guilty of both conspiracy and an attempt and the essential elements of both of those offenses must be proved before any defendant could be found guilty.

The jury returned a verdict of guilty as to each petitioner, but it acquitted Merrill Ferguson and Clarence Starks.

> to be members of the conspiracy and attempt. [A. 25–26.]
>
> * * * * *
>
> [I]t becomes necessary for me to define both "conspiracy" and "attempt," since the defendants are charged not with the substantive offense itself of obstructing, delaying or adversely affecting interstate commerce by extortion but rather a conspiracy and attempt so to do.
>
> Therefore, I shall define to you all of the requisites of both a conspiracy and an attempt, because all of these requisites must be found before the jury could find any defendant guilty. [A. 26.]
>
> * * * * *
>
> In this case the defendants are charged with a conspiracy and attempt, both as integral and essential parts of the single charge. [A. 32.]
>
> * * * * *
>
> [T]his charge being a single conspiracy and attempt to obstruct, delay and adversely or harmfully affect interstate commerce by extortion does not require proof that the conspiracy was successful, or that its unlawful objectives were obtained. The offense charged may be proved even though the conspiracy and attempt failed because the extortion was not successfully carried out. [A. 35.]

1. *The instructions to the jury precluded any chance that petitioners were implicitly acquitted at the first trial*

The court of appeals agreed with petitioners that the indictment is duplicitous. 515 F. 2d at 115–118. Because the court reversed petitioners' convictions on another ground, it did not consider whether the vice of duplicity had been eliminated by the trial court's instructions. In order to avoid any problem of duplicity in the next trial, it instructed the district court to require the prosecutor to elect between the conspiracy and attempt charges (*id.* at 118, 125).

On remand the prosecutor elected to proceed on the conspiracy charge. Petitioners contend, however, that a new trial even on the single charge is prohibited by the Double Jeopardy Clause. They argue that because the indictment improperly charged two offenses, the general verdict of guilty does not disclose the offense of which they were convicted. They appear to suggest that the jury may, contrary to the judge's instructions, have convicted them of attempt and implicitly acquitted them of conspiracy; this, they say, precludes a second trial for conspiracy.

We do not doubt that, in many cases, duplicitous indictments lead to ambiguous verdicts because of the possibility that the jury may have believed the defendants to be guilty of one crime but not the other. Another vice of duplicity, noted by the court of appeals, is that "there is no way of knowing with a general verdict on two separate offenses joined in a single count whether the jury was unanimous with respect to

either" (515 F. 2d at 117). But the instructions to the jury in this case foreclosed either possibility.

The prosecutor elected before trial to assume the burden of proving both conspiracy and attempt; he did so, presenting evidence of a conspiracy as well as a concerted attempt on the part of petitioners over a two-month period to extort money from Ulysses Rice. The court's instructions to the jury unambiguously informed it that it could convict only if it concluded that the prosecution had proved all the elements of both crimes.[44] Indeed, this was stressed to the jury immedi-

[44] As part of its instruction on conspiracy, the court told the jury "that there [must] be proof beyond a reasonable doubt of the commission by one or more of the conspirators of an overt act, that is an act knowingly committed in an effort to accomplish some object or purpose of the conspiracy" (A. 32), and it added that "[a]n attempt would, of course, constitute an overt act provided you find that there is a conspiracy, and an attempt to obstruct, delay or adversely affect interstate commerce by extortion" (*ibid.*). Petitioners argue (Br. 11–12) that this portion of the instructions made it possible for the jury to convict without finding that each defendant was guilty of attempted extortion. This argument depends upon an implausible reading of a straightforward and correct instruction. As the trial court correctly noted (A. 37), if one member of the conspiracy committed attempted extortion during the course of the conspiracy and in execution of the unlawful agreement, that attempt is attributable as a substantive offense to all other members of the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640. Moreover, even if this portion of the instruction muddies the verdict as to attempt, petitioners' double jeopardy claim is hardly advanced. The government has elected to proceed on the conspiracy charge, and speculation concerning what the jury may have found (or failed to find) regarding the attempt charge is irrelevant. Finally, if the attempted extortion properly can be viewed as simply an overt act of the conspiracy, the indictment would not be duplicitous, and the foundation on which petitioners rest their claim would be removed.

ately before it retired to deliberate. It cannot be assumed that the jury failed to follow these instructions (*Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341, 367), and its verdict of guilty therefore establishes that it found each petitioner guilty of both conspiracy and attempted extortion. There was no implied acquittal, or even the possibility of one, on the conspiracy count.

2. *A second trial is permissible after a conviction has been set aside on appeal.*

a. Although, in our view, the instructions to the jury adequately guarded against an ambiguous verdict, another more general argument also supports the proposition that a second trial is permissible under the Double Jeopardy Clause. Petitioners appealed and prevailed; their convictions were set aside at their behest. A second trial therefore is proper under a principle that has been "a well-established part of our constitutional jurisprudence" (*United States* v. *Tateo*, 377 U.S. 463, 465) for nearly a century.

> At least since 1896, when *United States* v. *Ball*, 163 U.S. 662, was decided, it has been settled that [the Double Jeopardy Clause] imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside.

North Carolina v. *Pearce*, 395 U.S. 711, 719–720 (footnote omitted). See also *Ludwig* v. *Massachusetts*, No. 75–377, decided June 30, 1976, slip op. 11–13; *United States* v. *Dinitz*, 424 U.S. 600, 610 n. 13; *United States* v. *Ewell*, 383 U.S. 116, 121–125; *Forman* v. *United States*, 361 U.S. 416; *Bryan* v. *United States*, 338 U.S. 552; *Stroud* v. *United States*, 251 U.S. 15, 16–18; *Murphy* v. *Massachusetts*, 177 U.S. 155, 158–159.

The Court explained the rationale of this rule in *United States* v. *Tateo*, *supra*, 377 U.S. at 466:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests.

Even if it were open to petitioners to argue that the jury may not have convicted them of conspiracy, this speculative possibility is hardly sufficient to override the soundness of the rule permitting retrial following reversal of a conviction.[45]

Petitioners' claim here relates to the jury's verdict, but it is not different in kind from any other assertion that, "but for" the error, the defendants might have been acquitted. Indeed, the possibility of harm to the defense and effect upon the verdict is the reason why some practices at trial are "error." The rule for which

[45] The problem of ambiguity in the jury's verdict is quite unlike the situation presented by *Green* v. *United States*, 355 U.S. 184, where it could be said with certainty that the jury had not convicted the defendant of murder in the first degree.

petitioners contend would immunize from further prosecution any defendant whose first trial was infected with error that might have affected the verdict—in other words, all error sufficiently serious to call for reversal. Fed. R. Crim. P. 52(a). That would require the Court to overturn *Tateo*, *Ball*, and many other cases. We submit that there is no reason to do so.

b. Petitioners attempt to avoid *Ball* and *Tateo* by arguing that this case is marked by "prosecutorial overreaching" that alone is responsible for the need for a second trial (Br. 10, 13–14). We submit, however, that there is no more "prosecutorial overreaching" here than in any other case in which the prosecutor makes a mistake that leads to reversal on appeal. In this case the prosecutor believed that the indictment was not duplicitous, and the district court did not require an election. The district court instructed the jury that it could convict only if it concluded that petitioners were guilty of both conspiracy and attempt; these instructions may have been unnecessarily favorable to petitioners.

The grand jury could have returned an indictment in two counts, one charging conspiracy and the other charging attempt. If petitioners had been convicted on both counts, they could have received consecutive sentences. *Callanan* v. *United States*, 364 U.S. 587. Because the two charges were (erroneously) included in one count, petitioners were spared exposure to this risk. The government's decision to prove both offenses simply increased its own burden of proof.[46] Nothing

[46] The indictment did not create the risk that petitioners in the future could be indicted and tried for either conspiracy or

that happened here was done in bad faith to harass or prejudice petitioners,[47] and a second trial therefore is permissible.

III

THE INDICTMENT CHARGES AN OFFENSE UNDER THE HOBBS ACT

We have argued at pages 49–51, *supra*, that even if a double jeopardy claim can be raised by appeal prior to trial, the special considerations pertaining to double jeopardy contentions are absent with regard to any other assertions that defendants may make, and that arguments "pendent" to a double jeopardy claim should await appellate resolution in the ordinary course. If the Court should disagree with that submission, however, it will be necessary to pass upon petitioners' argument that the indictment, redacted to charge only conspiracy, now charges no offense at all.

Petitioners are arguing nothing less than that duplicity cannot be cured by an election to proceed on one of the charges. This is so in their case, they say, because the redacted indictment could be read to charge that attempted extortion was the object of the conspiracy. This is insufficient, they continue, because the Hobbs Act does not prohibit a conspiracy to commit attempted extortion. They also contend that the indictment is insufficient to charge an offense because it does not allege that the defendants entered into an agreement to violate the law.[48]

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attempt. Had the conviction not been overturned at petitioners' behest, it would have been a bar to further criminal proceedings for either offense. *Green* v. *United States*, *supra*, 355 U.S. at 188; *Trono* v. *United States*, 199 U.S. 521, 533.

[47] Petitioners' assertion (Br. 10, 14) that the government acted in bad faith is groundless. The prosecutors had no incentive to offer petitioners two opportunities to be acquitted and every incentive to conduct the first trial so that a conviction, if obtained, would be upheld on appeal.

1. The indictment, with the attempt charge omitted, alleges (A. 5–6) that petitioners

> did unlawfully and willfully conspire * * * to obstruct, delay and affect [interstate] commerce * * * by extortion * * *, that is to say, by then and there attempting to obtain * * * money [from the victim], * * * to be paid in order to continue in the business of selling alcoholic beverages contracted for and obtained in interstate commerce * * *.

The indictment adequately charges a conspiracy to commit extortion. Petitioners' reading of the indictment as charging that the object of the conspiracy was only attempted extortion—that is, as charging that the conspirators intended to fail to extort money—is implausible. To be sure, the indictment alleges not only

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[48] Petitioners do not contend that the redaction of the duplicitous language denied them their Fifth Amendment right to be tried on an indictment properly returned by a grand jury, and such an argument would not be tenable. See, *e.g.*, *Salinger* v. *United States*, 272 U.S. 542; *United States* v. *Hall*, 536 F.2d 313, 319–320 (C.A. 10) (collecting cases), certiorari denied November 1, 1976 (Nos. 76–1 and 76–11); *United States* v. *Dawson*, 516 F.2d 796 (C.A. 9), certiorari denied, 423 U.S. 855. Although it could be argued that deletion of the duplicitous language altered the nature of the charge by allowing the prosecutor to avoid proving both conspiracy and attempt, petitioners have not done so, and neither the district court nor the court of appeals has considered such an argument. Petitioners requested the prosecufor to elect between conspiracy and attempt theories, and, as the court of appeals pointed out on the first appeal (515 F.2d at 117, footnote omitted), "requiring an election is an appropriate remedy for duplicitousness." See also Fed. R. Crim. P. 7(d).

that the unlawful object of the combination was extortion, but also that acts amounting to an attempted extortion were performed in furtherance of the conspiracy. But the nature of the conspiracy as an unlawful combination for the purpose of committing extortion is neither defeated nor improperly described because its contemplated object was not fully achieved. It is proper to charge that the object of a conspiracy was extortion and that, in furtherance of this unlawful object, the conspirators attempted to extort money from the victim.

2. Also insubstantial is petitioners' further contention that the indictment is fatally deficient for failure to allege agreement.[49] The indictment charges that petitioners "did unlawfully and willfully conspire." That is sufficient to allege agreement. "A natural reading of these words * * * is nothing more than an agreement to engage in the prohibited conduct." *United States* v. *Feola*, 420 U.S. 671, 687. Because every conspiracy is an agreement, petitioners in effect urge that the indictment is insufficient because it is not redundant. The use of the term "conspire" fairly informs petitioners of the charge against which they must defend, and it would enable them to plead an acquittal or conviction to bar future prosecutions for the same

[49] Petitioners apparently have abandoned their contention (Pet. 7–8) that the indictment is insufficient because it does not allege that the defendants conspired *together*. In any event, there would be nothing to such an argument. *Wright* v. *United States*, *infra*. A common sense reading of the indictment leads to the conclusion that it is alleging that they conspired with each other, and not each with one or more unnamed third persons.

offense. No more is required. *Hamling* v. *United States*, 418 U.S. 87, 117–119; *Hagner* v. *United States*, 285 U.S. 427, 431. See also *United States* v. *Armour & Co.*, 137 F.2d 269, 270–271 (C.A. 10); *Wright* v. *United States*, 108 Fed. 805, 809–811 (C.A. 5), certiorari denied, 181 U.S. 620.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded with directions to dismiss the appeal for want of jurisdiction. If the Court reaches the merits, it should affirm the judgment of the court of appeals.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

SHIRLEY BACCUS-LOBEL,
MARC PHILIP RICHMAN,
Attorneys.

NOVEMBER 1976.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1197, 1198—September Term, 1975.

(Argued June 9, 1976 Decided July 7, 1976.)

Docket Nos. 76-1189, 76-3025

UNITED STATES OF AMERICA,

Appellee,

v.

VIRGIL ALESSI,

Defendant-Appellant.

Before:

FRIENDLY, FEINBERG and VAN GRAAFEILAND,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*, which, after an evidentiary hearing directed by this court, again denied appellant's motion to dismiss an indictment against him on the ground that prosecution would violate a plea-bargaining agreement made in the Eastern District of New York.

Affirmed.

NANCY ROSNER, Esq., New York, N.Y., *for Appellant.*

JAMES P. LAVIN, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney, Southern District of New York, and Frederick T. Davis, Assistant United States Attorney, of Counsel), *for Appellee.*

FRIENDLY, *Circuit Judge:*

On or about June 30, 1972, a witness disappeared. The ensuing events have come to plague the district courts for the Eastern and Southern Districts of New York and this court as well. We now have the third case this year in which this court must consider the bearing of what then happened.

The witness was a central figure in the case developed by Eastern District Strike Force Attorney James Druker to prove the allegations embodied in Eastern District indictment 72 Cr. 473. That indictment charged, among other matters, a conspiracy to violate the federal narcotics laws encompassing appellant, Virgil Alessi, and Vincent Papa, Anthony Passero, Frank D'Amato, Anthony Loria, Sr., and others; and also charged the just-named defendants with engaging in a continuing criminal enterprise as defined in 21 U.S.C. § 848. At the time of the disappearance, Druker was in the midst of plea bargaining the charges; the "package" he proposed to achieve had been written down and apparently cleared with his superiors in Washington. With his prime witness lost, Druker's case was greatly weakened, and he proceeded, over the next two months, to negotiate a bargain more favorable to the defendants. Agreement between Druker and the several attorneys who represented Vincent Papa, one of whom also represented ap-

pellant Alessi, was finally reached on August 18, 1972. No contemporaneous written evidence of the terms of the bargain exists; what they in fact were is a matter best deferred for the moment.

Sometime between August 18 and September 5, Druker learned of information that had been supplied to the Eastern District Strike Force by Joseph Ragusa, which potentially implicated Papa in yet further illegal narcotics activities. Papa was not informed of this, and ignorant of it he pleaded guilty, on September 5, 1972, to the conspiracy charge and also to a pending tax evasion information.

On October 2, 1972, Virgil Alessi waived indictment and he, too, pleaded guilty—to a one count conspiracy charge contained in a superseding information; 72 Cr. 473 was dismissed as to him. Appellant's counsel contends that this format was used so that it would be clear that this plea acted to bar a pending prosecution in Nassau County. Appellant also waived his pre-sentence report, and was sentenced at the time of his plea. Before accepting the plea, the district court asked Alessi if anyone had promised him anything to induce it; Alessi answered that no one had. However, when the judge indicated that he would be willing to sentence Alessi to "15 years without batting an eye," it rapidly became evident that the truth was otherwise. The upshot was that, on Druker's recommendation, Alessi received a five-year suspended sentence with a mandatory three-year special parole. Appellant now claims that the consideration for his plea included certain representations by Druker, which, it is contended, prevent the prosecution in the present case from going forward.

On two previous occasions we have considered these promises of the summer of 1972. The first case, decided on April 2 of this year, was *United States* v. *Papa*, —— F. 2d ——, slip op. 2977, an appeal from Papa's convictions in the Southern District of New York for conspiracy

to violate and a substantive violation of the narcotics laws. Papa's most important contentions were that the "Southern District conspiracy" was the same as the "Eastern District conspiracy" to which he had previously pleaded, and therefore that the Southern District prosecution on that charge was violative of his right not to be twice placed in jeopardy; and that the Southern District case, based in good part on the testimony of Joseph Ragusa, violated the bargain. This court affirmed the convictions, holding as to the first point that after all the facts were in, Papa had failed to show the claimed identity of the conspiracies; and as to the second point that even if the Eastern District U.S. Attorney's Office would have been bound not to prosecute crimes discovered by use of Ragusa's information, the bargain did not reach so far as to preclude the Southern District prosecution which had been developed entirely independently.

The second case, even more recently decided, was *United States* v. *Alessi*, —— F.2d ——, slip op. 3881 (May 26, 1976) (*Alessi I*), which involved the same appellant as the present case. That appeal, like this one, was from a pre-trial order: the challenge was to a district court decision denying Alessi's claim that the 1972 promises were broad enough to prevent an Eastern District prosecution for tax evasion during the years in which the "Eastern District conspiracy" had been in operation. This court affirmed, holding that the pre-trial order was appealable but that whatever crimes were covered by the bargain, a crime as distant from the conspiracy as tax evasion was not.

We come now to this case. By indictment filed on August 4, 1975, Anthony Passero, Lawrence Iarossi, and others were indicted by a grand jury in the Southern District of New York for conspiracy to violate the narcotics laws; Vincent Papa, Virgil Alessi, and Frank D'Amato were among the named but unindicted co-conspirators. Alessi

was indicted on five substantive counts which, as supplemented by the bill of particulars, all charge him as an aider and abettor for delivering, at locations in Long Island City, and others parts of Queens, various quantities of heroin to one Anthony Manfredonia, which Manfredonia then took to the Southern District for distribution to others. The Government states that if this case does finally come to trial, it will introduce evidence showing that Alessi "was well aware" that the heroin "was being transported to and concealed, possessed and distributed to others in the Southern District of New York." The Government also contends, and appellant offers nothing in refutation, that insofar as the indictment names Alessi it is based on information supplied by Manfredonia, a witness developed entirely by the Southern District, and, as Druker stated in an affidavit, unknown to him in 1972. Its brief states that "[n]o witness or evidence used in the obtaining of this indictment was obtained from prosecutors in the Eastern District." Finally, the Government contends, although this point is indeed disputed, that Druker's representations were by their own terms not binding on the Southern District.

The essence of appellant's claim, which is based on *Santobello* v. *New York*, 404 U.S. 257 (1971), was succinctly stated by the trial court as follows:

> According to Alessi, the plea-bargain agreement provided that Alessi would not be prosecuted with respect to any overt acts committed during the course of the Eastern District conspiracy which might constitute a substantive violation of the narcotics laws. Alessi contends that the present indictment violates the plea-bargain agreement and that his prosecution would therefore amount to a denial of due process.

Trial was scheduled to begin on January 20, 1976. In November 1975, appellant moved to dismiss the indictment on the ground just indicated. Judge Bonsal, on December 29, reserved decision until the conclusion of the trial, when he would have the benefit of the evidence that had been introduced as to the true nature of the crimes charged and would conduct an evidentiary hearing. Alessi appealed, and the Government moved to dismiss the appeal. Without deciding the question of appealability, a panel of this court, on January 19, issued a writ of mandamus (*Alessi II*) directing the trial court either to sever Alessi from the trial and await its evidence, or to hold an evidentiary hearing and determine the motion prior to trial; a short unprinted opinion was filed the next day. Following issuance of the writ, also on January 19, a brief hearing was held before Judge Bonsal. Appellant's counsel urged a severance, in part on the ground that the district court should await the results of the appeal in *Papa,* which had been argued but not yet decided. Appellant also agreed to waive any claim of denial of a speedy trial that might arise out of the attendant delay. Judge Bonsal, apparently impressed by these points and also by the fact that Alessi was not a defendant to the conspiracy count, granted the severance.

Trial as to seven of the other defendants, under the title *United States* v. *Iarossi,* began on January 20 and ended on February 4, with a verdict against all defendants on all counts. A notice of appeal was filed, and the case is now docketed in our court, #76-1132, with argument presently scheduled to be heard in the middle of September.

Meanwhile the pretrial proceedings regarding defendant Alessi went on. On February 11, 1976, Judge Bonsal held another short hearing. Appellant's counsel and the prosecutor agreed that there was no further factual material to be introduced: the issue was submitted on the basis of

the record developed in *Papa,* in yet another case concerning Papa and Alessi that had come before the Eastern District in October, 1975, and in *Iarossi.* Four days after our decision in *Papa,* on April 6, 1976, Judge Bonsal denied the motion to dismiss the indictment. He supported his decision on two grounds: first, the conspiracy charged in the current indictment was not the same as that charged and pleaded to in the Eastern District, and therefore the substantive crimes with which Alessi was charged were not "overt acts" of that conspiracy; and second, the plea bargain was not intended to cover crimes developed by independent investigations undertaken by U.S. Attorney's Offices outside of the Eastern District. Alessi appealed from this decision on April 13, 1976.

Shortly thereafter, Alessi's trial was scheduled for May 4. On April 29, he petitioned for yet a second writ of mandamus, to halt the trial pending determination of the appeal. On May 3, a temporary stay was issued, and on May 6 a writ followed, staying the trial and setting an expedited briefing schedule. We heard oral argument on June 9.[1]

I. *Appealability*

Understandably distressed that it is now in this court for the second time, with Alessi's trial severed from that of his co-defendants and delayed for many months and with another appeal in prospect if he is tried and convicted (in which he might argue that developments at trial

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1 This case came to us docketed under the dual caption "Virgil Alessi v. Honorable Dudley B. Bonsal" and "United States of America v. Virgil Alessi." As we understand it, Alessi is presently pursuing only an appeal, and is not seeking to invoke the extraordinary writ for yet a third time; apparently the first caption is the result of the April 29 request for relief and is not now applicable. In any event we would decline to issue mandamus under the principle announced in *Kaufman and Withington* v. *Edelstein,* —— F.2d —— (2 Cir. 1976), slip opinions 3287, 3298-99.

had demonstrated that our decision on the merits here was wrong), the Government naturally wonders how all this is consistent with *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940). In an opinion by Mr. Justice Frankfurter, the Court there said among other things that Congress from the very beginning has, by forbidding "piecemeal disposition on appeal of what for practical purposes is a single controversy," "set itself against enfeebling judicial administration"; that "[t]o be effective, judicial administration must not be leaden-footed"; and that "[t]hese considerations of policy are especially compelling in the administration of criminal justice," since "encouragement of delay is fatal to the vindication of the criminal law." See also *DiBella* v. *United States*, 369 U.S. 121, 124, 126 (1962); *Kerr* v. *U.S. District Court*, 44 U.S.L.W. 4838, 4841 (U.S. June 14, 1976). Alarmed at what has happened by the recent advance of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), into the criminal field under the seductive guise that a defendant is entitled under some circumstances to be protected from an unlawful trial and not simply from an unlawful conviction, and fearful that still worse may befall in the future, the Government asks that we reconsider our interpretation of the "final decision" rule of 28 U.S.C. § 1291 in *United States* v. *Beckerman*, 516 F.2d 905, 906-07 (2 Cir. 1975), or at least limit the damage to the precise situation there presented—a second trial admittedly for the same offense following one alleged to have been unlawfully aborted by the trial judge, and to decline to follow the recent decision on another of Alessi's due process appeals, *United States* v. *Alessi I*, *supra*. Since, as in *Beckerman* and *Alessi I*, we agree with the Government on the merits and there is a fair possibility that the issue may soon be settled, *Abney* v. *United States*, No. 75-6521, *certiorari granted*, 44 U.S.L.W. 3719 (U.S. June 14, 1976); see also *Barket* v. *United States*, No. 75-

1280, *petition for certiorari pending*,[2] we think it would be more useful instead of seeking *en banc* reconsideration of *Beckerman* and/or *Alessi I*,[3] to make our own analysis but not now to challenge prior precedent in this court. Such an analysis is particularly desirable because the Government has recently called to our attention two Supreme Court decisions, *Rankin* v. *The State*, 78 U.S. (11 Wall.) 380 (1870), and *Heike* v. *United States*, 217 U.S. 423, 433 (1910), seemingly favorable to it, only the latter of which it cited in *Beckerman*, and there only in summary fashion, and neither of which was cited to the Fourth Circuit in *United States* v. *Lansdown*, 460 F.2d 164 (1972), on which *Beckerman* heavily relied. On the other hand, neither party has cited more recent Supreme Court decisions which might seem to look the other way, although we conclude they in fact do not.

In *Rankin* v. *The State*, *supra*, a defendant, charged with murder in the courts of Tennessee, pleaded in bar an

2 These petitions were brought by defendants to review decisions of the Eighth Circuit in *United States* v. *Barket*, 530 F.2d 181 (1975), and of the Third Circuit in *United States* v. *Abney* (unprinted judgment order), which entertained defendants' pretrial appeals on the ground of double jeopardy but ruled for the Government on the merits. In both cases the Government has urged that the defendants' petitions be granted in order to have the Court resolve the question of appealability.

In *Beckerman* and *Alessi I* in this circuit, the Government also prevailed on the merits and therefore was not in a position to seek certiorari from the ruling as to appealability. Perhaps for the same reason it did not seek consideration of the appealability issue *en banc*, as we would have to do if we followed its suggestion.

3 We do not agree with the statement in *Alessi I*, slip op. at 3884, that the appealability of an order refusing to dismiss an indictment as violating a plea bargain was "implicitly" affirmed by the first issuance of mandamus in this case. Apart from the possible effect of this court's rule § 0.23 that disposition by summary order "shall not be cited or otherwise used in unrelated cases before this or any other court," the order granting mandamus held only that Alessi was entitled to an evidentiary hearing—not that he was entitled to appeal from an adverse decision rendered thereafter.

acquittal by a general court-martial for the same crime. After the lower court had sustained the plea and entered a judgment of acquittal, the Supreme Court of Tennessee reversed and remanded for a trial on the merits. The Supreme Court dismissed the writ of error on the ground that the state court judgment was not final.[4]

Next came *Heike* v. *United States*, 217 U.S. 423 (1910). Charged with violations of the customs laws and with a conspiracy to defraud the United States of its revenues, Heike filed a plea in bar claiming immunity from prosecution because he had been compelled to testify on the same subject matter before a grand jury. After the trial court had directed the jury to deny the plea, it permitted Heike to plead over, and set a date for trial. A Justice of the Supreme Court allowed a writ of error to review the denial of the plea in bar, and the United States moved to dismiss the writ. The Court held the writ was not within § 5 of the Court of Appeals Act of 1891, 26 Stat. 826, 827-28, allowing direct appeal to the Supreme Court, "In

4 Mr. Justice Bradley's opinion is short enough to be quoted in full:

> The difficulty with the case, as brought before us, is that the judgment was not a final one in the case. This court, under the 25th section of the Judiciary Act, can only take cognizance of final judgments of the State courts. And although the court has been liberal in it's construction of the statute as to what judgments are final, yet the judgment in this case cannot be deemed such by any reasonable stretch of construction. It is a rule in criminal law *in favorem vitae*, in capital cases, that when a special plea in bar is found against the prisoner, either upon issue tried by a jury, or upon a point of law decided by the court, he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty." And this is the effect of the judgment of reversal rendered by the Supreme Court of Tennessee in this case; so that in no sense can that judgment be deemed a final one. The case must go back and be tried upon its merits, and final judgment must be rendered before this court can take jurisdiction. If after that it should be brought here for review, we can then examine the defendant's plea and decide upon its sufficiency. Writ of error dismissed.

any case that involves the construction or application of the Constitution of the United States." Construing this provision as embodying the final judgment rule, the Court, 217 U.S. at 429, deemed it certain that the judgment below did "not dispose of the whole matter litigated in this proceeding. . . ." The Court continued, 217 U.S. at 430:

> As the case now stands, upon the plea of not guilty, upon which the issue raised must be tried to a jury, certainly the whole matter has not been disposed of. It may be that upon trial the defendant will be acquitted on the merits. It may happen that for some reason the trial will never take place. In either of these events there can be no conclusive judgment against the defendant in the case. It is true that in a certain sense an order concerning a controlling question of law made in a case is, as to that question, final. Many interlocutory rulings and orders effectually dispose of some matters in controversy, but that is not the test of finality for the purposes of appeal or writ of error. The purpose of the statute is to give a review in one proceeding after final judgment of matters in controversy in any given case. Any contrary construction of the Court of Appeals Act may involve the necessity of examining successive appeals or writs of error in the same case, instead of awaiting, as has been the practice since the beginning of the Government, for one review after a final judgment, disposing of all controversies in that case between the parties.

Turning to Heike's contention that the immunity statute provided that "No person shall be *prosecuted* or be subjected to any penalty or forfeiture" (emphasis supplied) and that the Government would not be keeping its promise if it proceeded beyond indictment, the Court said, 217 U.S. at 431:

> But we are of opinion that the statute does not intend to secure to a person making such a plea immunity from prosecution, but to provide him with a shield against successful prosecution, available to him as a defense, and that when this defense is improperly overruled it may be a basis for the reversal of a final judgment against him. Such promise of immunity has not changed the Federal system of appellate procedure, which is not affected by the immunity statute, nor does the immunity operate to give a right of review upon any other than final judgments.

Still more to the point, the Court said, by way of supporting argument, 217 U.S. at 432:

> The Constitution of the United States provides that no person shall be twice placed in jeopardy of life and limb for the same offense, yet the overruling of a plea of former conviction or acquittal has never been held, so far as we know, to give a right of review before final judgment.

The Court then went on to refer to and quote from *Rankin* v. *The State*, *supra*. All this is especially significant in that the statement in *United States* v. *Ball* that "The prohibition [of the double jeopardy clause] is not against being twice punished, but against being twice put in jeopardy", 163 U.S. 662, 669 (1896)—the cornerstone of our recent decision in *Beckerman* upholding review before the second trial—must have been fully as well known to the members of the *Heike* court, several of whom had participated in *Ball*, as it is to judges of the 1970's.

The arrival of *Cohen* on the scene would not seem, at first blush, to affect the holding or the considered dictum in *Heike*. For the cornerstone of the *Cohen* decision was

that the order of the district court refusing to apply New Jersey's statute requiring security for costs in stockholders' derivative actions

> did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably.

337 U.S. at 546. An order denying a plea of double jeopardy, or denying a claim that an indictment violates the terms of a plea bargain, *is* merged in the final judgment and can be reviewed on an appeal therefrom—except on the view that the purposes of the double jeopardy and due process clauses can only be served by preventing prosecution (beyond the stage of indictment) rather than conviction, a view rejected by *Heike* by its holding with respect to the immunity statute and by dictum with respect to double jeopardy.

The Court's first, long its only, application of *Cohen* in a criminal case, *Stack* v. *Boyle*, 342 U.S. 1 (1951), did not presage any significant impairment of the final judgment rule. The order there held to have been appealable under *Cohen* was a refusal to reduce bail pending trial. The rationale was thus explained in the concurring opinion of Mr. Justice Jackson, who should have known the meaning of *Cohen* if anyone did, 342 U.S. at 12:

> While only a sentence constitutes a final *judgment* in a criminal case, *Berman* v. *United States*, 302 U.S. 211, 212, it is a final *decision* that Congress has made reviewable. 28 U. S. C. § 1291. While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment. The purpose

of the finality requirement is to avoid piecemeal disposition of the basic controversy in a single case "where the result of review will be 'to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation . . . .'" *Cobbledick* v. *United States*, 309 U.S. 323, 326. But an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it can be reviewed before sentence, it never can be reviewed at all. The relation of an order fixing bail to final judgment in a criminal case is analogous to an order determining the right to security in a civil proceeding. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, or other interlocutory orders reviewable under 28 U. S. C. § 1292.

Strain began to appear with *Parr* v. *United States*, 351 U.S. 513 (1956). A defendant indicted for federal income tax evasion secured a transfer of his case to another division of the same district because of local prejudice. Before trial began, the Government reindicted the defendant in another district and moved to dismiss the initial indictment, which motion was granted. A bare majority of the Supreme Court held the dismissal was not appealable; any review had to await the trial and verdict on the second indictment.

Mr. Justice Harlan, writing for the Court, offered two complementary rationales. If the initial indictment was "viewed in isolation" from the second indictment, then appeal was unavailable because the defendant was not aggrieved by dismissal of the first indictment. If instead the two indictments were considered as part of the same prosecution, then the second indictment was "as it were a superseding indictment, [and] petitioner has not yet been

tried, much less convicted and sentenced." 351 U.S. at 518. Parr had not succeeded in bringing himself within the *Cohen* exception. The appeal did not concern matters "outside the stream of the main action," or matters which would "not be subject to effective review as part of the final judgment." The burden of a possibly needless trial was not sufficient reason for instant appealability.

> True, the petitioner will have to hazard a trial under the [second] indictment before he can get a review of whether he should have been tried in Laredo under the [first] indictment, but "bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States* [309 U.S. at 325].

351 U.S. at 519-20.

All this was in full conformity with *Heike* which the majority cited with approval, 351 U.S. at 517. The strain was manifested by the opinion of the Chief Justice speaking for four Justices in dissent:

> We countenance plain harassment if we require Parr to be tried under what may turn out to be an invalid indictment at Austin before he can obtain appellate review of dismissal of the Laredo case. Should this occur, Parr would have been required to undergo two trials, one at Austin and another at Laredo. Section 1291 should not be construed so as to bring about such a result.

351 U.S. at 523.

Passing the cases denying review of decisions to suppress or not to suppress evidence at trial, *Carroll* v. *United States*, 354 U.S. 394 (1957), and *DiBella* v. *United States*, *supra*, 369 U.S. 121, we arrive at the cryptic footnote to

Mr. Justice Douglas' opinion in *Brady* v. *Maryland*, 373 U.S. 83, 85 n.1 (1963). Because of the prosecution's suppression of material favorable to the defense, the Supreme Court of Maryland had reversed the judgment convicting Brady and remanded for a new trial limited, however, to the issue of punishment. The discussion of the Supreme Court's appellate jurisdiction was as follows:

> Neither party suggests that the decision below is not a "final judgment" within the meaning of 28 U. S. C. § 1257 (3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that "Final judgment in a criminal case means sentence. The sentence is the judgment" (*Berman* v. *United States*, 302 U. S. 211, 212) cannot be applied here. If in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt "that presents a serious and unsettled question" (*Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 547) that "is fundamental to the further conduct of the case" (*United States* v. *General Motors Corp.*, 323 U. S. 373, 377). This question is "independent of, and unaffected by" (*Radio Station WOW* v. *Johnson*, 326 U.S. 120, 126) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See *Largent* v. *Texas*, 318 U. S. 418, 421-422. Cf. *Local No. 488* v. *Curry*, 371 U. S. 542, 549.

373 U.S. at 85 n.1.

Next came *Mills* v. *Alabama*, 384 U.S. 214 (1966). Mills had been charged with violating an Alabama statute which forbade electioneering on election day, by publishing an

editorial. The trial court sustained a demurrer based on First Amendment grounds, the Supreme Court of Alabama reversed and remanded for trial, and Mills appealed to the Supreme Court. Mr. Justice Black denied the State's motion to dismiss for want of a final judgmgent, saying, 384 U.S. at 217-18:

> This argument has a surface plausibility, since it is true the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state statute if he wrote and published the editorial. Mills concedes that he did, and he therefore has no defense in the Alabama trial court. Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets. (Footnote omitted.)

In *California* v. *Stewart*, 384 U.S. 436 (1966), one of the four cases decided under the title of *Miranda* v. *Arizona*, the State had obtained certiorari from a judgment of its Supreme Court which had reversed a conviction because of the admission of a confession allegedly taken in violation of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). Stewart's

motion to dismiss for lack of a final judgment was denied; a footnote, 384 U.S. at 498 n.71, stated:

> After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal.[5] Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. § 1257(3) (1964 ed.), we denied the motion. 383 U.S. 903.

In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), Mr. Justice White endeavored to rationalize where these decisions and similar ones in civil cases had left the final judgment rule of 28 U.S.C. § 1257. He began with a general statement:

> [A]s the cases have unfolded, the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come. There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and of delayed justice," *Radio Station WOW, Inc.* v. *Johnson*, [326 U.S. 120] at 124, as well as precipitate interference with state litigation.

420 U.S. at 477-78 (footnotes omitted). He then fitted the cases into four categories. The first category, of which *Mills* was cited as an example, consisted of cases "in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final." 420 U.S. at 479. The second category, of which *Brady* was an example, consisted of cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." 420 U.S. at 480. A third category, of which *Stewart* was an example, included cases "where the federal claim has been finally decided, . . . but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. . . . [I]n these cases, if the party seeking interim review ultimately prevails [on remand] on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." 420 U.S. at 481. The fourth category consisted of

> those situations where the federal issue has been finally decided in the state courts with further proceedings

5 Hart & Wechsler, The Federal Courts and the Federal System (1973 ed.), raise the question, p. 628:

> Is this not so in every criminal case in which a state appellate court orders a new trial on federal grounds?

> pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-83. It was this fourth category in which *Cox Broadcasting Corp.* apparently was deemed to fall. Finality was found not simply because "if the Georgia court erroneously upheld the statute, there should be no trial at all" but because even if the defendant prevailed at trial on non-federal grounds, "there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments." 420 U.S. at 485.

There is one characteristic common to all four categories of these § 1257 cases which is missing in appeals to a federal court of appeals from an order of a district court. This is that, as said in Mr. Justice White's general statement, *supra*, 420 U.S. at 477-78 "[i]n most, if not all, of the cases in these categories, these additional proceedings [on remand] would not require the decision of other federal questions that might also require review by the Court at a later date. . . ." In *Brady*, *Mills* and *Stewart*, the

Supreme Court was presented with the opportunity to review, albeit at a formally interlocutory stage, the only question ever likely to be put to it, whatever the stage of the proceedings.[6] It is the one-time character of Supreme Court review of state cases that seems critical to all four of Justice White's categories. The situation is quite different with respect to federal criminal prosecutions, where the entire law defining the offense and the trial procedures is federal. If the trial occurs, it is likely that a number of "federal" questions will later be presented to the court of appeals for review—even perhaps the identical question with additional factual background —so there is not the same convenience in an appellate court's addressing any single federal question before passing upon all. Also, when acting under § 1257 with respect to cases that have been remanded for trial by a state supreme court, the Court is dealing with cases which have already passed once through the state hierarchy and can reach the Supreme Court after the remand only by again passing through a state trial court and one appellate court or often two. In contrast, dismissal of an appeal from a pretrial order of a federal district court simply means that the trial will occur and, unless the appellant wins, the court of appeals will then hear a multi-faceted appeal by him in any event. In short we conclude that the *Brady-Mills-Stewart* line of cases and their civil counterparts under 28 U.S.C. § 1257 rest on considerations peculiar to Supreme Court review of final judgments of state courts and are not authoritative on the application of *Cohen* to a court of appeals review of a pretrial order of a district court in a federal criminal case.[7] In addition to the dif-

6 This clearly was true in *Brady* and *Mills*—not quite so clearly but probably true in *Stewart*.

7 In saying this we have not overlooked what might be taken as a suggestion in Mr. Justice Jackson's concurring opinion in *Stack* v. *Boyle*,

ferentiating considerations apparent in Mr. Justice White's discussion in *Cox Broadcasting Corp.* and those we have noted, a court of appeals has the opportunity of utilizing "supervisory" or "advisory" mandamus to correct any truly egregious error of a district court, see *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249 (1957); *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964); *Kerr* v. *U.S. District Court, supra*, 44 U.S.L.W. at 4841; *American Express Warehousing, Ltd.* v. *Transmerica Ins. Co.*, 380 F.2d 277, 282-83 (2 Cir. 1967); *Kaufman and Withington* v. *Edelstein, supra* note 1, at 3298-99; Note, Supervisory and Advisory Mandamus under the All Writs Act, 86 Harv. L. Rev. 595 (1973).[8] This resource, usable on a selective basis, also dictates against broad indentation of the final decision rule, especially in criminal cases.

The decisions of the courts of appeals present a varied picture. This court's first encounter with a problem similar to that here presented was *United States* v. *Ford*, 237 F.2d 57, 67 (2 Cir. 1956), vacated as moot, 355 U.S. 38 (1957). *Ford* was a tax evasion case with separate counts for each

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supra, 342 U.S. at 12, that the words "final judgment" may call for more than the words "final decision." We think all the Justice was saying was that it is not fatal to an appeal under 28 U.S.C. § 1291 that a judgment is not formally final, a condition which in a criminal case would be met only by the sentence, see *Berman* v. *United States*, 302 U.S. 211, 212 (1937), if the other requirements of *Cohen* were satisfied. In *Parr* v. *United States, supra*, 351 U.S. at 518, Mr. Justice Harlan treated the two terms "judgment" and "decision" as interchangeable. As pointed out by Mr. Justice Rehnquist in *Cox Broadcasting Corp.* v. *Cohen, supra*, 420 U.S. 502-03 n.3, statutes providing for review of decisions of federal courts had used the term "final judgment or decree" until the Evarts Act of March 3, 1891, creating the courts of appeals, 26 Stat. 826, and the legislative history affords no explanation for the Senate's changing these words, which were in the House bill, to "final decision."

8 Whether or not the All Writs statute, 28 U.S.C. § 1651, empowers the Supreme Court to issue mandamus to a state court, such power has been most sparingly used. See Hart & Wechsler, *supra*, at 298, 458.

of five years. The jury found Ford guilty for 1948, 1949 and 1950 and not guilty for 1951. It was unable to agree as to 1947; the trial judge first directed a verdict of acquittal and then vacated this. After affirming the convictions, the court dealt briefly with the claim that a retrial on the 1947 count would constitute double jeopardy. Judge Hincks, speaking also for Chief Judge Clark and Judge Frank, said, 237 F.2d at 67:

> Since the order [vacating the directed verdict of acquittal] is interlocutory and the defendant has not yet been placed in jeopardy thereunder, the issue is not currently appealable and the pending appeal as to Count 1 must accordingly be dismissed.[9]

Next came the decision of the Fifth Circuit in *Gilmore* v. *United States*, 264 F.2d 44, cert. denied, 359 U.S. 994 (1959). There a defendant, after reversal of his conviction on a first trial, went through a second trial resulting in a hung jury, and then sought to appeal a denial of his motion for acquittal on the ground that the evidence had been insufficient for submission to the jury. The court dismissed the appeal for lack of jurisdiction. Writing for a panel that included Chief Judge Hutcheson and Judge Wisdom, Judge John R. Brown, after recounting the argument of Gilmore's counsel, which relied on the statement

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9 Along with the Government we are unable to agree with the statement in *United States* v. *Beckerman, supra*, 516 F.2d at 906, that *Ford's* "precedential authority has been undermined since the opinion was later vacated as moot" as a result of Ford's subsequent death. In so vacating a judgment the Supreme Court refrains from passing on its merits, *Durham* v. *United States*, 401 U.S. 481, 483 n. (1971) (per curiam); the judgment loses its status as *res judicata* but not its persuasive power as a precedent in this court. We likewise fail to see the basis for the statement in *Beckerman* that the issue was "only obliquely considered" in *Ford*, although review of the briefs does indicate that the court did not have the benefit of thorough briefing, with no party discussing the effect of *Cohen*.

in *United States* v. *Ball, supra,* 163 U.S. at 669, to which we have previously referred, and commenting on the bearing of *Bryan* v. *United States*, 338 U.S. 552 (1950), had this to say:

> [E]ven if it were assumed that the second trial was forbidden as double jeopardy, that does not invest us with jurisdiction to vindicate such right. The Constitution does not guarantee an appeal. That comes wholly from the statute. There are many instances in which it is ultimately determined that constitutional rights have been violated. But the nature of the asserted right, i.e., a constitutional one, does not distinguish appellate review of any such question from the assertion of other rights, whether statutory or common law, or from a procedural rule. At least so long as a criminal case is pending, review of such matters, as for example, unlawful search and seizure, unlawful arrest, unlawful detention, unlawful indictment, unlawful confession, must await the trial and its outcome. This is so even though, at the end of that trial, or an appeal from the judgment of conviction, it is ultimately determined[7] that the violation of the constitutional right compels an acquittal. When that is the outcome, the individual accused may claim in a very real sense to have been subjected to a trial that ought never to have taken place. Congress might, as it has recently done in a very limited way for civil matters, 28 U.S.C.A. § 1292(b), provide for interlocutory appeals to test such questions prior to trial and a final judgment in the traditional sense. Until Congress does so, the individual affected is witness to the fact that, "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." Cobbledick v. United States, 1940, 309 U.S. 323, 325, 60 S.Ct. 540, 541, 84 L.Ed. 783.
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> The Constitutional right, or the asserted violation of it, does not bridge the gap of appellate statutory jurisdiction. Nor, for like reasons, does it, through some reverse process, expand the term "final decision" into something which, contrary to a long-settled Congressional policy, amounts in actuality to piecemeal review.

264 F.2d at 46-47 (footnote omitted).

Movement in the opposite direction began with the Fourth Circuit's decision in *United States* v. *Lansdown, supra,* 460 F.2d 164. The case afforded about as strong an inducement for allowing appeal from an interlocutory order, under *Cohen's* exception to the finality rule, as could be imagined. The court apparently thought the Government's case had been weak and the defendant's strong and that the jury ultimately would have reached a verdict of acquittal. After having decided that the judge improperly ended the jury's long deliberations, the court considered the question of appealability and held *Cohen* to be applicable. Starting with the much quoted statement in *United States* v. *Ball, supra,* it reasoned, 460 F.2d at 171:

> Even if an appellate court reverses the conviction in a second trial on the grounds of double jeopardy, a defendant has still not been afforded the full protection of the fifth amendment since he has been subjected to the embarrassment, expense, anxiety and insecurity involved in the second trial. If an individual is to be provided the full protection of the double jeopardy clause, a final determination of whether jeopardy has attached to the previous trial must, where possible, be determined prior to any retrial. (Footnotes omitted).

Even so, the court added in a footnote, 460 F.2d at 171 n.8:

> Our holding is limited to the narrow facts and circumstances of this case. Where the charges in the first and second trial differ and a double jeopardy argument rests on a claim that certain facts required for a conviction in the second trial were previously determined in an earlier trial, review must wait until the completion of the second trial.[10]

In addition to *United States* v. *Beckerman*, *supra*, 516 F.2d at 906-07, *Lansdown* has attracted two more adherents, *United States* v. *DiSilvio*, 520 F.2d 247, 248 n.2a (3 Cir.), *cert. denied*, 96 S. Ct. 447 (1975); *United States* v. *Barket*, 530 F.2d 181 (8 Cir. 1975), *cert. pending*, No. 75-1280.

The Fifth Circuit, however, has remained unconvinced. *United States* v. *Bailey*, 512 F.2d 833 (5 Cir.), *cert. dismissed under Rule 60*, 96 S. Ct. 578 (1975), was an appeal from denial of a motion to dismiss an indictment after a trial claimed to have been illegally aborted by the judge. Dismissing the appeal, the court repeated Judge (now Chief Judge) Brown's analysis in *Gilmore* and expressly rejected the reasoning of *Lansdown*.

Subsequent cases demonstrate the impracticability of cabining *Landsdown* and *Beckerman* to the precise facts there presented. In *United States* v. *Alessi I*, *supra*, this court found that the rationale of *Beckerman* necessarily comprehended a due process claim of failure "to fulfill an earlier promise not to prosecute" for other crimes made in consideration of a guilty plea. The opinion did not explain why the case stood differently from the immunity from

10 The *Lansdown* court did not say whether its decision would apply in another variation of double jeopardy, namely, a case where the defendant claims but the prosecution denies that the second prosecution is for the same offense.

prosecution promised in *Heike*. Perhaps the panel concluded that *Heike* had been eviscerated by *Cohen*, but Mr. Justice Harlan did not think so, even as late as *United States* v. *Parr*, *supra*, 351 U.S. at 517, 519. The further onrush of *Cohen* in the criminal area is illustrated by *United States* v. *MacDonald*, 531 F.2d 196 (4 Cir. 1976), where the *Lansdown* rationale was extended to a claim of denial of speedy trial.[11] Indeed if *Lansdown* were sound, why not? Here too the constitutional guarantee is not solely against conviction but against the trauma of having to await or undergo a trial long after arrest. See *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967). Yet the consistent practice in this circuit has been that denials of motions to dismiss indictments for lack of a speedy trial are reviewed on appeal from convictions, if these should occur.[12] We have little doubt that, as the Government argues, once *Cohen* is construed to have created a "right not to be tried" exception to the final decision rule in criminal cases, it will be hard to limit the claims for such review which counsel will advance.[13] This is not just an "alarming specter,"

11 Once again in *MacDonald*, as before in *Lansdown*, *supra*, 460 F.2d at 171 n.8, the Fourth Circuit panel characterized its holding as having a narrow effect, 531 F.2d at 199:

> Not every speedy trial claim, however, merits an interlocutory appeal. Generally, this defense should be reviewed after final judgment. It is the extraordinary nature of MacDonald's case that persuaded us to allow an interlocutory appeal.

This would seem to us to be rather a reason for effecting pretrial review by mandamus; we find nothing in *Cohen* that conditions its applicability on the merit of a particular appeal.

12 Decisions such as *Lansdown*, *Beckerman*, *Alessi I* and *MacDonald* also raise the question whether a defendant *must* appeal within 10 days of the order by which he is aggrieved rather than await the outcome of the trial. See Hart & Wechsler, The Federal Courts and the Federal System (2d ed. 1973) 1554-1555, see also 629.

13 One that readily comes to mind is a claim of too speedy a trial, compare *Stans* v. *Gagliardi*, 485 F.2d 1290 (2 Cir. 1973). If an appeal

as the Government put it in *Lansdown*, 460 F.2d at 172; in four short years the "specter" has acquired a number of earthly embodiments. If the point were open in this circuit, we would cast our lot in favor of the continuing vitality of *Heike* v. *United States*, *supra*, 217 U.S. 423, and the final decision rule in criminal cases as applied in the Fifth Circuit, and would dismiss this appeal for want of jurisdiction. However, we are constrained by contrary precedent in this circuit and, because of the possibility of a decision at the next term of the Supreme Court, will not seek *en banc* reconsideration.

II. *The Merits*

Appellant's argument that this prosecution should be halted runs as follows: The terms of the plea bargain struck on August 18, 1972, covered defendant Alessi as well as defendant Papa. The bargain included, among other matters, an agreement not to prosecute, as a substantive crime, anything which could have been included as an overt act in the Eastern District conspiracy alleged in 72 Cr. 473. However, the argument runs, the conspiracy charged in the present Southern District indictment is the same conspiracy as that previously alleged in the Eastern District, and the substantive crimes with which appellant is taxed are the "overt acts" or "pieces" of the Southern District conspiracy. Therefore the crimes presently charged fall within the scope of the bargain. Furthermore, appellant contends, the plea bargain, as here relevant, was intended to extend as far as the Southern District U.S. Attorney's Office, and, as a matter of law, the Eastern District had the power to bind the Southern District in this fashion even though no approval from the Southern District had been sought or received. Since Alessi's plea to the superseding information was intended to give him the same protection as if he had pleaded to the Eastern District indictment, and since he pleaded in reliance on the promises here sought to be enforced, appellant concludes that the present indictment, as to him, should be dismissed.[14]

While not necessarily conceding the other matters, the Government, on appeal, has joined issue primarily on two of these points. The Government's main position is that the plea bargain should not be construed to prevent the Southern District U.S. Attorney's Office from prosecuting any crime, other than those that would fall under a double jeopardy ban, so long as the prosecution was independently developed. In the alternative, the Government contends that Druker could not, by his independent actions, bind the Southern District.

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lies from an order directing a trial for which a defendant has become unprepared because too much time has elapsed, why not from an order directing a trial for which the defendant has not had enough time to prepare? Why not also in the many cases where a defendant claims he is being unconstitutionally forced to trial in the absence of counsel of his own choosing?

14 Appellant's brief also raises a direct double jeopardy claim, although the point was not pressed at oral argument. The contention apparently is that Alessi is being charged as an aider and abettor not because he "actually knew of Manfredonia's subsequent transfers" but because they were "the reasonably foreseeable consequences of his act"; that this theory of liability is the same as that used to hold a conspirator for the acts of his co-conspirators; and that, accordingly, on this view of intent aiding and abetting is the same crime as conspiracy. We have no need to consider the legal merits of this argument because the factual predicate is lacking. The Government states that it will prove that Alessi "knew some of Manfredonia's customers" and that Alessi had "a continuing, active stake" in the sales. The Government is, of course, quite right in stating that appellant cannot assume that the evidence against him will be identical to that introduced against the already tried defendants in *Iarossi*. The Government's offer of proof seems sufficient to support a conviction for aiding and abetting which is distinct from the crime of conspiracy, see, e.g., *United States* v. *Bommarito*, 524 F.2d 140, 145 (2 Cir. 1975). In any case it seems that if there is a question here, it is an issue whether the evidence will be sufficient to prove the crime charged—something which of course cannot now be considered—and not a matter of double jeopardy.

We find it unnecessary to go further than the terms of the bargain. In developing this, both sides rely almost entirely on the evidence introduced in a hearing held by the district court in *United States* v. *Papa, supra*, where two witnesses testified: Druker and one of Papa's attorneys. Indeed, the Government contends that the issue on the merits has already been decided by the interpretation of this evidence given in the *Papa* opinion, and cites the following language, —— F.2d ——, slip op. at 2995-96:

> The representations made by Druker related expressly and by necessary implication exclusively to Eastern District investigations and prosecutions. The terms of the bargain did not extend to matters under investigation elsewhere. Papa's attorneys' principal concern was to ensure that their client would not be re-indicted on "pieces" of the Eastern District conspiracy. Druker promised that the bargain immunized Papa from any further prosecution on the basis of any future information he received related to the Eastern District conspiracy. Papa's attorneys secured a promise from Druker that there would be no additional prosecution stemming from matters presently under investigation in the Eastern District. Druker specifically refused to grant appellant *"carte blanche"* immunity as to all his past criminal conduct, and carefully noted that Papa was still subject to prosecution on any unrelated criminal activity. Never once was Druker asked to inquire about investigations in the Southern District nor was he asked to include Southern District crimes in the plea negotiations. Indeed, when Druker was queried by Papa's attorneys as to the money seized from Papa in February, 1972, he responded: "It's in the Southern District's bailiwick and I don't know what if anything they are going to do with it."

Appellant's counsel argues that, when read in context, this language does not settle the matter. Her contention is that Druker made two separate promises: first, "that there would be no additional prosecution stemming from matters presently under investigation in the Eastern District"; second, that Papa and Alessi "would not be re-indicted on 'pieces' of the Eastern District conspiracy." Only the first of these promises, it is claimed, was limited to prosecutions developed or carried out by the Eastern District; the second one, the promise applicable to this case, was intended to bind the Government as a whole. The *Papa* opinion, it is said, is not to the contrary because what was being decided was whether Ragusa, whose existence was known to Druker before the plea was entered, could subsequently be used as a witness in the Southern District trial for crimes arising from a distinct conspiracy, given that he had been located by means of an independent investigation. As the court stated in the sentence immediately following the portion just quoted, "[a]lthough the Ragusa matter did not relate to a 'piece' of the Eastern District conspiracy, it did concern a matter under investigation in the Eastern District at the time the plea was entered."

While the quoted portions of the *Papa* opinion could be read in this fashion, we are not persuaded that they were so intended. The blanket statement that "[t]he representations made by Druker related expressly and by necessary implication exclusively to Eastern District investigations and prosecutions" is most naturally read as relating to the discussion of the entire consideration offered by Druker, including both of what appellant claims were two distinct promises. Insofar as the opinion does draw the distinction appellant wishes to make, it does not do so until after the whole bargain has been described and characterized. However, even though appellant's counsel

indicated her desire, in the court below, to have Alessi's case await the results of the then-upcoming decision in *Papa*, we would not hold that opinion's construction of the bargain to be conclusive against appellant, were we not convinced that the underlying testimony supports the interpretation of the bargain for which the Government contends.

It is true that there are segments of Druker's testimony which, read in isolation, appear to support appellant's contention that one of the promises was not limited to Eastern District prosecutions. For example:

> Q. [Papa's Attorney] So that Mr. Papa was promised as well, then, in return for his plea, overt acts in furtherance of this conspiracy would not give rise to subsequent individual prosecutions?
>
> A. [Druker] That's correct.

Or, to be a bit more concrete, Druker said:

> I advised, for example, that if somewhere down the chain of the ladder it turned out that Mr. Loria had been selling heroin to five or six people who were not named in my conspiracy but that it developed or became clear that this was as a result of the same chain from Mr. Papa on up, that he would be covered on this. Anything to do with that conspiracy.

However, in context these statements must fairly be read to delineate only the scope of the crimes covered. Druker never once directly testified that the promise or promises he had made were intended to cover any prosecution by other than the Eastern District Office; nor did Papa's attorney. To the contrary, Druker testified, as the *Papa* opinion points out, that he never checked with the Southern District as to their investigations; that he never asked

the Southern District to join in the bargain; that he was never asked by Papa's lawyers to check with the Southern District; and that this was true even though Papa's attorneys had been told that the nearly $1 million seized from Papa at the time of his arrest in the Bronx was in the "Southern District's bailiwick" and, for all Druker knew, was the subject of investigation there. We can only conclude that insofar as the plea bargain can be understood to confer an immunity from narcotics law prosecutions greater than that given by the double jeopardy clause, it was not in the contemplation of either side that anyone outside of the Eastern District U.S. Attorney's or Strike Force Offices was bound. While this gave the defendants less than complete protection, their attorneys were doubtless more interested in nailing down the substantial concessions they had already achieved than in having further inquiry made. From Druker's point of view the limitation is certainly intelligible; he had good cause for not wanting to bind another Office which he had not consulted. We would, of course, have a different case if there were evidence to show that the Eastern District was attempting to evade its own obligations by transferring a prosecution across the East River; but there is none. Since we find nothing in this prosecution that offends the plea bargain, the order below is

Affirmed.

FEINBERG, *Circuit Judge* (concurring):

On the appealability issue, I concur in the result. On the merits, I join in the majority opinion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RONALD DENNIS YOUNG,
Defendant-Appellant.

No. 75-3102
OPINION

Appeal from the United States District Court for the Southern District of California

Decided October 19, 1976

Before: CHOY and WALLACE, *Circuit Judges*, and RICHEY,* *District Judge.*

RICHEY, District Judge:

The question presented on this appeal is whether a district court's denial of a motion to dismiss an indictment is a final and appealable order within the meaning of 28 D.E.O. 57297 where the challenge to the indictment is founded on a claim of double jeopardy. Because we answer in the negative, we dismiss the appeal for lack of jurisdiction and do not reach the merits of appellant's constitutional claim.

In 1974 appellant was convicted in federal district court of conspiracy to possess with intent to distribute, and possession with intent to distribute, cocaine under 21 U.S.C. §§ 241(a)(1) and 246. In June 1975 appellant filed a motion for new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The motion was granted after an evidentiary hearing at which

* The Honorable Mary Anne Richey, United States District Judge for the District of Arizona, sitting by designation.

a former co-defendant testified in a manner tending to exonerate appellant. Appellant's second trial commenced on July 29, 1975. During the retrial, appellant filed two motions for judgment of acquittal. Each was denied. The case was submitted to the jury August 1. After the jury had deliberated for almost two days, the court polled the jurors as to the likelihood of reaching a unanimous verdict. The jurors responded that there was no reasonable probability of reaching a verdict if given additional time. Without objection from counsel, the court declared a mistrial. Retrial was scheduled for August 20. On August 12, appellant moved to dismiss the indictment on the ground that further prosecution of the case would constitute a violation of his fifth amendment guarantee against double jeopardy. After consideration of appellant's arguments, the district court denied the motion. Appellant thereafter filed notice of appeal from the orders of the district court denying the motions for acquittal and the motion to dismiss the indictment. He alleges jurisdiction in this Court pursuant to 28 U.S.C. § 1291.

Title 28 U.S.C. § 1291 provides for jurisdiction "of appeals from all final decisions of the district courts of the United States." In the context of a mistrial, the denial of a motion for acquittal is not a final order. *United States v. Carey*, 475 F.2d 1019, 1021 (9th Cir. 1973); *United States v. Kaufman*, 311 F.2d 695, 698–699 (2d Cir. 1963). Therefore this Court is without jurisdiction to review the district court's denial of the motions for acquittal until final judgment is rendered. Similarly, as a general rule the denial of a motion to dismiss an indictment is not a final order within the

meaning of the statute. *People of the Territory of Guam v. Lefever*, 454 F.2d 290 (9th Cir. 1972); *Kyle v. United States*, 211 F.2d 912 (9th Cir. 1954). Thus, were it not for appellant's claim of double jeopardy, this case could be disposed of by memorandum. However, several circuits recently have carved out an exception to the general rule of finality where a claim of former jeopardy is raised. Since the issue is one of first impression in this Circuit, we examine the question at some length.

Appellate review is not a constitutional entitlement. It is a purely statutory right, and to avail oneself of that right, one must satisfy the terms of the statute. Under 28 U.S.C. § 1291, the essential condition of review is that there be a "final decision" in the case. This prerequisite of finality is founded on the long-standing policy of avoidance of piecemeal review: "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right of a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration." *Cobbledick v. United States*, 309 U.S. 323, 324–325 (1940). *See also DiBella v. United States*, 369 U.S. 121 (1962).

The district court's denial of appellant's motion to dismiss was not final in the sense of terminating the

litigation, for "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212 (1937). Appellant, however, argues that his claim of double jeopardy removes the case from the general rule of finality. Relying on the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its adaptation in *United States v. Lansdown*, 460 F.2d 164 (4th Cir. 1972), he contends that the motion to dismiss the indictment involved issues collateral to the main action and that to deny appeal at this time will preclude effective review of his constitutional claim. For reasons stated below, we find *Cohen* inapplicable to the instant situation.

In *Cohen* the Supreme Court recognized an exception to the rule of "finality" for orders made during the course of litigation which related to matters outside the main cause of action and which would not be subject to effective review as part of final judgment in the action. There the district court had denied defendants' request that plaintiffs file an expense bond in a shareholders' derivative suit as required under state law. In effect, the district court order had finally determined the rights at stake. Moreover, the order "did not make any step toward final disposition of the merits of the case and [would] not be merged in final judgment." 337 U.S. at 546.

The alleged right to the posting of a security bond was "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case

is adjudicated." 337 U.S. at 546. The Court held the district court's order appealable because it was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." 337 U.S. at 547.

In subsequent decisions the Court has made clear that the *Cohen* doctrine should be limited to those few situations where the order appealed from is truly collateral to the main cause of action and not subject to review on appeal from a final judgment. In *Parr v. United States*, 351 U.S. 513 (1965), the Court rejected appellant's argument that the *Cohen* rationale should be applied to allow appeal from a dismissal of an indictment. There the government had obtained a second indictment in another district and then moved for leave to dismiss the first indictment. The district court granted the motion and defendant appealed. Finding that the district court's action was a step toward final disposition of the case and would be merged in the final judgment, the Court concluded that the order in question was not appealable. 351 U.S. at 519–520.[1]

[1] The narrow applicability of *Cohen* was recently made clear in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), where the Court held appealable a district court's order imposing notice costs on the plaintiff class. The two grounds for the *Cohen* holding were set forth: (1) the order appealed from conclusively settled the rights at stake, and (2) the order concerned a collateral matter which could not be reviewed on final judgment. At 171. A decision from this Circuit further illustrates the rigorous standard imposed by *Cohen*. In *Biggins v. United States*, 205 F.2d 650 (9th Cir. 1953), we allowed appeal from an order adjudging defendant incompetent to stand trial. There we stated: "The order does not purport to merely refuse trial from day to day at the convenience of the court or for a short period of time to enable defendant to recover from a temporary upset. It is, in nature, the kind of order which would never be reviewed on direct appeal after trial." At 652. *See also Kyle v. United States*, 211 F.2d 912 (9th Cir. 1954).

The extension of the *Cohen* doctrine upon which appellant relies and which we today reject is found in *United States v. Lansdown, supra.* There the Fourth Circuit held that a district court's denial of a motion to dismiss an indictment based on a claim of double jeopardy was a final and appealable order. In the court's view, the right asserted under the fifth amendment met the criteria of the *Cohen* ruling: it was separable from the main issue of guilt or innocence; it was constitutional in nature and, thus, too important to be denied review; and it would be irreparably lost if review were not had before trial. 460 F.2d at 171. The court concluded that to provide a defendant with the full protection of the guarantee against double jeopardy, the decision as to whether jeopardy has attached must be reviewed prior to any retrial.[2] *Lansdown* has been adopted in three other circuits. *United States v. Barket*, 530 F.2d 181 (8th Cir. 1975); *United States v. DeSilvio*, 520 F.2d 247 (3d Cir. 1975); *United States v. Beckerman*, 516 F.2d 905 (2d Cir. 1975).[3]

[2] We note that the court expressly narrowed the applicability of its holding "to that very small number of criminal cases in which a mistrial is declared against the wishes of the defendant." 460 F.2d at 172. Thus, on its face, the decision does not encompass the present proceedings. However, the Fourth Circuit has subsequently given the case broad application. *See United States v. MacDonald*, 531 F.2d 196 (4th Cir. 1976).

[3] In *United States v. Alessi*, —— F.2d —— (2d Cir. July 7, 1976), the court, in a lengthy discussion, expressed disagreement with the holding of *Lansdown*, but boxed to its own precedent, noting the grant of certiorari June 14, 1976, in *Abney v. United States*, —— F.2d —— (3d Cir. Feb. 9, 1976).

In *United States v. Bailey*, 512 F.2d 833 (5th Cir. 1975), the Fifth Circuit refused to follow *Lansdown*. The court reasoned that the presence of a double jeopardy claim did not transform the trial court's interlocutory order into a final decision.

> But even if it were assumed that the second trial was forbidden as double jeopardy, that does not invest us with jurisdiction to vindicate such right. The Constitution does not guarantee an appeal. That comes wholly from the statute. . . . At least so long as a criminal case is pending, review of such matters as, for example, unlawful search and seizure, unlawful arrest, unlawful detention, unlawful indictment, unlawful confession, must await the trial and its outcome. 512 F.2d at 835, quoting from *Gilmore v. United States*, 264 F.2d 44, 46 (5th Cir. 1959).

We agree with the Fifth Circuit. Review of the district court's denial of appellant's motion to dismiss the indictment should be postponed until final judgment is obtained. Unlike the defendants' request for an expense bond in *Cohen*, appellant's claim of double jeopardy does not concern a purely collateral matter. Rather, it is a challenge to the validity of the prosecution itself. The district court's rejection of appellant's claim was a step toward final resolution of the main action. The constitutional claim will be merged in the final judgment and may be reviewed on appeal from that judgment.

In so holding, we do not overlook the unique nature of the double jeopardy guarantee as compared to other constitutional rights. Unlike a fourth amendment claim or a claim based on the guarantee against self-incrimination, the double jeopardy claim goes to the very

power of the government to bring an individual into court to answer the charge against him. *Menna v. New York*, 423 U.S. 61 (1975); *United States v. Wilson*, 420 U.S. 332 (1975); *Blackledge v. Perry*, 417 U.S. 21 (1974). Denying review at this time may subject appellant to a prosecution which the government has no right to initiate. However, "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick*, *supra*, 309 U.S. at 325–326.

Moreover, denying interlocutory review of appellant's double jeopardy claim is consistent with early opinions from the Supreme Court. In *Rankin v. The State*, 78 U.S. (11 Wall.) 380 (1870), the Court held that a state court's rejection of defendant's plea of a prior acquittal for the same offense was not a final judgment and, thus, not appealable. And in *Heike v. United States*, 217 U.S. 423 (1910), the Court found non-appealable a district court's denial of defendant's plea of immunity to further prosecution.[4]

Finally, we note that the delays and disruptions

[4] In dicta the Court in *Heike* remarked that a plea of double jeopardy was likewise not appealable until final judgment. "[A] plea of former conviction under the constitutional provision that no person shall be twice put in jeopardy for the same offense does not have the effect to prevent a prosecution to final judgment, although the former conviction or acquittal may be finally held to be a complete bar to any right of prosecution. . . ." 217 U.S. 433.

caused by intermediate appeals are especially detrimental to the effective administration of the criminal law. *DiBella v. United States*, *supra*. Rather than give 28 U.S.C. § 1291 an unduly expansive interpretation, we prefer to limit aggrieved defendants to review after final judgment, or, under exceptional circumstances, to relief pursuant to the extraordinary writs.[5]

Appeal dismissed.

[5] Title 28, Rules of Appellate Procedure, Rule 21. *See, e.g.*, *Goldman, Sachs & Co. v. Edelstein*, 494 F.2d 76 (2d Cir. 1974).

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